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Supreme Court of the United States

OCTOBER TERM, 19[illegible] 63-

No. [illegible] #1

MANUEL ARISTEGUIETA, ETC., PETITIONER,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1960
CERTIORARI GRANTED MARCH 20, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 77

MANUEL ARISTEGUIETA, ETC., PETITIONER,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. A] Caption (omitted in printing).

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

18176

THE FIRST NATIONAL CITY BANK OF NEW YORK, THE FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Appellants,

v.

MANUEL ARISTEQUIETA, Consul General of The Republic of Venezuela, on behalf of The Republic of Venezuela, Appellee.

Transcript of Record on Appeal—Filed January 20, 1960

APPEARANCES:

Shearman, Sterling & White, 20 Exchange Pl., New York City, and Fowler, White, Gillen, Humkey & Trenam, Industrial National Bank Bldg., Miami, Florida, on behalf of The City National Bank of New York, Appellant.

Coudert Brothers, 488 Madison Avenue, New York City and Fowler, White, Gillen, Humkey & Trenam, Industrial National Bank Bldg., Miami, Florida, on behalf of The French American Banking Corporation, Appellant.

Sage, Gray, Todd & Sims, 37 Wall Street, New York City, and Fowler, White, Gillen, Humkey & Trenam, Industrial National Bank Bldg., Miami, Florida, on behalf of The Royal Bank of Canada, Appellant.

[fol. 1a] Walters, Moore & Costanzo, Ainsley Bldg., Miami, Florida, on behalf of Marcos Perez Jimenez, Appellee.

Ward & Ward, DuPont Bldg., Miami, Florida, and Covington & Burling, 701 Union Trust Bldg., Washington, D. C., on behalf of Manuel Aristequieta, Consul General, Republic of Venezuela, Appellee.

[fol. 2]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

ORDER VACATING NOTICE OF TAKING DEPOSITION—
November 13, 1959

This Cause having come on to be heard on motion of the defendant for a protective order, and the Court having heard the arguments of counsel and being duly advised in the premises, and it being the opinion of the Court that for counsels' guidance and in the interest of proper administration of justice in this cause and within the Court's discretion that fixed rules of procedure should be established for all matters relating to this cause and the Court being of the further opinion that the Federal Rules of Criminal Procedure are the most appropriate for the most part, as opposed to Federal Rules of Civil Procedure, it is hereby

[fol. 3] Ordered, Adjudged and Decreed that as may relate to this particular cause all matters of procedure will be subject to the provisions the Federal Rules of Criminal Procedure as they may apply and the Federal Rules of Civil Procedure will not apply, and it is further

Ordered, Adjudged and Decreed that the Notice of Taking Depositions of George F. Nolte, Assistant Vice-President of the First National City Bank of New York, and other unknown officers and employees of that bank, at 10:30 A. M., November 6, 1959, at New York, and all summonses

connected therewith, be and the same are hereby vacated, the taking of testimony pursuant to said notice and summonses prohibited, and the parties concerned protected against failure of non-compliance therewith.

Done and Ordered at Miami, Florida, this the 13th day of November, 1959.

Emett C. Choate, Judge, United States District Court.

[fol. 4]

IN UNITED STATES DISTRICT COURT

ORDER VACATING ORDER OF NOVEMBER 13, 1959, ETC.—November 23, 1959

This Cause coming on to be heard upon the Petition of the Plaintiff to amend the protective Order of November 13, 1959, and the pronouncements therein, and the Court being advised in the premises, the Court is of the opinion that the Order entered on November 13, 1959 ordering that the procedure for taking of depositions of witnesses in the United States as permitted under the Federal Rules of Civil Procedure should not apply and the procedure is to be governed as stated in the Treaty. That the Court is of the opinion that the right of subpoena exists as relates to witnesses and further that the Court may, by order, provide for the securing of testimony where a witness cannot be secured to appear before the Court. It is,

Ordered, Adjudged and Decreed that the Order of November 13, 1959 entered in the above cause, be and the same, is hereby vacated in so far as it relates to the establishment of special rules governing procedure in the above styled case.

Done and Ordered in Chambers in the Federal Courthouse, Dade County, Florida, this 23rd day of November, 1959.

Emett C. Choate, United States District Judge.

[fol. 5]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR THE ISSUANCE OF SUBPOENAS AND GRANTING THEREOF—November 25, 1959

Now comes the plaintiff in this cause, by his undersigned attorney, and respectfully moves the Court for the issuance of subpoenas as set forth in the attached affidavit.

Respectfully submitted,

William G. Ward, 1240 duPont Building, Miami 32, Florida, Attorney for Plaintiff.

Granted and so ordered.

Wm. C. Mathes, United States District Judge.

November 25, 1959

[fol. 6]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR THE ISSUANCE OF SUBPOENAS

I, Sidney S. Sachs state as follows:

1. I am an attorney for the plaintiff in this case.

2. In this proceeding plaintiff, through counsel, has requested that subpoenas be issued by this court directed to:

(a) George F. Nolte, Assistant Vice-President
First National City Bank of New York (successor to National City Bank of New York),
55 Wall Street, New York City, N. Y.

(b) Walter Anderson, Secretary
French American Banking Corporation,
31 Nassau Street, New York City, N. Y.

(c) J. W. Ganaan, Agent
Royal Bank of Canada (New York Branch),
68 William Street, New York, N. Y.

(d) Isaac B. Grainger, President
Chemical Corn Exchange Bank,
165 Broadway, New York 15, N. Y.

(e) Wallace M. Davis, President
The Hibernia National Bank in New Orleans
Carondelet, Gravier & Union Street, New Orleans, La.

3. In the Amended Complaint, as amended, it is alleged among other allegations, in substance that from 1948 to 1958 the defendant occupied positions of major importance in the Government of Venezuela, in which capacities he administered and controlled the public funds of the Republic, and had responsibility for administering its public affairs.

4. It is further alleged that during such period defendant [fol. 7] by himself and in concert with others engaged in a series of acts which had as an objective his and their illicit enrichment at the expense of the Republic.

5. It is further alleged that during such period defendant (a) by various means and devices abstracted and misappropriated funds whose administration and custody had been entrusted to him by virtue of his office, (b) corruptly discharged the functions of his office by receiving and exacting commissions and other benefits not due to him, paid to him or other persons on his behalf, (c) otherwise corruptly discharged the functions of his office, as a result of which he obtained for himself directly and through persons acting on his behalf, benefits for acts of public administration; that through these means and devices defendant personally profited in the amount of many millions of bolivares (equivalent to many millions of United States dollars).

6. The evidence in this case will show that the persons and corporations whose names are listed on the requested subpoenas are some of the persons with whom defendant acted in concert in conducting his illegal activities.

7. The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant. It is expected that it will also disclose the method of the illegal concert of action between the defendant and others, as well as the extent and nature of a means for concealment [fol. 8] of his illegal conduct adopted by the defendant.

8. In affiant's opinion it is essential that the requested subpoenas be issued in order that the full evidence may be produced and the interests of justice thereby served.

Sidney S. Sachs, Affiant.

Sworn to and subscribed before me this 25th day of November, A.D., 1959.

(Notarial Seal)

Estefania Santos, Notary Public, State of Florida at Large.

My commission expires: August 4, 1961.

[fol. 9]

IN UNITED STATES DISTRICT COURT

MOTION OF THE FIRST NATIONAL CITY BANK OF NEW YORK, ET AL. TO QUASH—Filed December 10, 1959

Comes Now, The First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada, by and through their undersigned attorneys, and show unto the Court that subpoenas duces tecum have been served upon each of the movants requiring the production of certain records and documents referred to therein returnable before the above Court on Monday, December 14th, at 10:00 A.M. In accord with Rule 45 (b) of the Federal Rules of Civil Procedure, the aforementioned movants respectfully move this Court for an Order quashing the aforementioned subpoenas duces tecum and for grounds to be argued, say:

1. That the subject cause out of which the aforementioned subpoenas duces tecum issued is an extradition proceeding in which there is no legal basis or predicate for the issuance of subpoenas at the request of or in behalf of the demanding country, to-wit, the plaintiff herein, and that accordingly this Court is without jurisdiction to issue the same.

2. That it affirmatively appears that the subject cause is in the nature of a civil action and as such, these sub-

poenas were improperly served at a place without the district in which the hearing specified in the subpoenas is to be held and at a distance greater than 100 miles from [fol. 10] the place at which the hearing specified in the subpoenas is to be held in violation of Rule 45 (e)(1) of the Federal Rules of Civil Procedure.

3. That the said subpoenas duces tecum are unreasonable, burdensome and oppressive in that the records and documents sought are so voluminous and cover such an extensive period of time that the movants are unable to comply with the terms thereof without undue expense and inconvenience over an extended period of time which would be necessitated in reviewing and checking records during the ten year period referred to therein.

The First National City Bank of New York, by Shearman & Sterling & Wright and Fowler, White, Gillen, Humkey & Trenam, By Henry Burnett; French American Banking Corporation, by Coudert Bros. and Fowler, White, Gillen, Humkey & Trenam, By Henry Burnett; Royal Bank of Canada, by Sage, Gray, Todd and Sims and Fowler, White, Gillen, Humkey & Trenam, By Henry Burnett, 401 Industrial National Bank Bldg., Miami, Florida.

Certificate of service (omitted in printing).

[fol. 11]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN V. ORAM—Filed December 14, 1959

State of New York,
County of New York, ss.:

John V. Oram, being duly sworn, deposes and says:

1. I am an Assistant Agent at the New York Agency of The Royal Bank of Canada, a corporation organized under the laws of the Dominion of Canada. This affidavit is submitted in support of the motion made by the said Bank to

quash the subpoena served upon the said Bank in New York City returnable in this Court on December 14, 1959.

2. The subpoena would require the said Agency to search through its voluminous records of daily transactions to locate and ear-mark credits and debits of each of eight accounts covered by the subpoena and to locate any instructions, correspondence, credit slips, debit slips and photographic film of checks drawn on the accounts. Examination of the film reels alone would involve examination [fol. 12] of thousands of photographic reproductions of checks in order to locate the checks of a particular accountholder. It is estimated that the time required by the work called for by this subpoena in connection with the debits to the accounts would be in excess of one week at the said Agency and five to seven days at the premises of the processing firm. In addition, it is estimated that a minimum of ten days would be required to search for correspondence, credit and deposit slips and other material called for which are located in the Agency's archives, storage rooms and vaults.

3. The subpoena is unreasonable, burdensome and oppressive not only because of the length of time covered by the subpoena and the volume of material specified, but particularly because under no circumstances could the production of copies of checks drawn on the accounts have any relevancy to the issue in the proceeding as to whether there is sufficient evidence to justify extradition. Withdrawals from the accounts in question could have no possible bearing upon the question as to whether the holder of the account properly or improperly obtained the funds deposited therein.

John V. Oram

Sworn to before me this 11th day of December, 1959.

Edward P. Miller, Notary Public, State of New York, No. 31-2702075; commission expires March 30, 1961.

(Notarial Seal)

[fol. 13]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JEAN DENOYER—Filed December 14, 1959

State of New York,
County of New York, ss.:

Jean Denoyer, being duly sworn, deposes and says:

1. He is vice-president and treasurer of French American Banking Corporation, which has been served with a subpoena in this action by the United States Marshal in the Southern District of New York. Since service of the subpoena, he has familiarized himself with the number and type of the documents required to be produced by the subpoena.

2. The broad categories of documents listed in the schedule attached in the subpoena include documents in several different departments and in many different files of French American Banking Corporation.

3. In the case of some of the persons whose accounts must be searched to locate and produce the documents required by the subpoena, French American Banking Corporation has more than one, and as many as five, accounts relating to a single person; a single account has more than [fol. 14] one hundred separate transactions in the period covered by the subpoena; and each transaction generates two or more separate documents or entries filed or made in different places, and among many other different and unrelated matters.

4. In order to locate and produce a single one of such documents, there is the possible necessity in some cases of examining individually more than one thousand separate credit advices, debit advices, and other materials in the several files of French American Banking Corporation.

5. For a large percentage of the documents required to be produced by the subpoena, it is impossible or impractical to make photographic copies of the original document or entry because of the manner in which such document or

entry is regularly bound for safekeeping in the files and records of French American Banking Corporation, and it would therefore be necessary to make copies by hand of each of such documents and entries.

6. The time and personnel required to locate and copy all of the documents and entries required to be produced by the subpoena is not readily available to French American Banking Corporation.

7. The expense of time, personnel and physical copying of the documents and entries required by the subpoena would be burdensome and oppressive to French American [fol. 15] Banking Corporation.

Jean Denoyer

Subscribed and sworn to before me this 11th day of December, 1959.

Marthe L. Marquet, Notary Public, State of New York, Commission expires: March 30, 1961.

(Notarial Seal)

IN UNITED STATES DISTRICT COURT

ORDER ON HEARING OF DECEMBER 14, 1959 GRANTING MODIFICATION OF SUBPOENAS AND DENYING MOTIONS—December 15, 1959

This cause was continued from the hearing of November 23, 1959, as set forth in the order of this Court dated November 25, 1959. That order provided, among other things:

"The plaintiff has presented its motion for an order of this Court permitting and directing the issuance of certain subpoenas, which said matters will be settled by this Court by separate order.

[fol. 16] "It Is Further Ordered that this cause and further proceedings herein shall be continued until 10:00 o'clock a.m. of December 14, 1959, at which time the defendant is hereby directed to be present in Court."

Pursuant to that order, this cause came on to be heard at 10 o'clock a.m. of December 14, 1959; the defendant and his counsel were present in court, and the plaintiff was represented in court by his counsel.

As stated in the aforesaid order of November 25, 1959, the plaintiff had submitted a motion for the issuance of certain subpoenas, and this Court, on November 25, 1959, entered a further order granting the said motion and issued subpoenas directed to the persons set forth in the affidavit attached to said motion, which persons were as follows:

(a) George F. Nolte, Assistant Vice-President
First National City Bank of New York
(successor to National City Bank of New York),
55 Wall Street, New York City, N. Y.

(b) Walter Anderson, Secretary
French American Banking Corporation,
31 Nassau Street, New York City, N. Y.

(c) J. W. Ganaan, Agent
Royal Bank of Canada (New York Branch),
68 William Street, New York, N. Y.

(d) Isaac B. Grainger, President
Chemical Corn Exchange Bank,
165 Broadway, New York 15, N. Y.

[fol. 17]

(e) Wallace M. Davis, President
The Hibernia National Bank in New Orleans
Carondelet, Gravier & Union Street,
New Orleans, La.

At the hearing on December 14, 1959, it appeared that service of the subpoenas had been effected, and on that day the subpoenas as served were filed with the Clerk of this Court, except as hereinafter noted.

From statement of counsel for the plaintiff, it appeared that when the subpoena was served upon Wallace M. Davis, the President of the Hibernia National Bank in New Orleans, counsel arranged with counsel for said Bank for the making of photostatic copies of records assembled by

said Bank in response to the subpoena, and that such copies of said instruments were furnished to plaintiff's counsel and to defendant's counsel, thus obviating at this time the necessity for further return or further appearance by the said Wallace M. Davis, without prejudice to the rights of either party to this cause to request additional information by additional subpoena or orders of this Court upon further application. The further provisions of this order, therefore, do not apply with respect to the subpoena directed to the said Wallace M. Davis.

In the interim between November 25, 1959, and December 14, 1959, certain motions were filed, as follows:

A motion was filed on behalf of the defendant by his counsel, David W. Walters, to quash or modify all of the [fol. 18] aforesaid subpoenas.

A motion was filed by the firm of Fowler, White, Gillen, Humkey & Trenam as attorneys for the First National City Bank of New York, for the French American Banking Corporation, and for the Royal Bank of Canada, to quash the subpoenas respectively served upon officers of the said respective banks.

A motion was filed by the firm of Smathers, Thompson & Dyer as attorneys for Silvio Gutierrez as a depositor in the Chemical Corn Exchange Bank to quash the portion of the subpoena directed to an officer of said Bank pertaining to his account or accounts with said Bank.

A motion was filed by Scott, McCarthy, Preston, Steel & Gilleland as attorneys for Napoleon Dupouy, a depositor in the French American Banking Corporation and in the First National Bank of New York to quash the subpoenas directed to officers of such banks, insofar as they pertained to him.

In the course of the hearing of December 14, 1959, the defendant through his counsel also filed an additional motion to discharge the defendant from custody and to dismiss the proceedings.

There were present at the hearing of December 14, 1959, counsel for the First National City Bank of New York, for the French American Banking Corporation, and for the Royal Bank of Canada, counsel for Silvio Gutierrez and counsel for Napoleon Dupouy. There was also present a

[fol. 19] representative of Chemical Corn Exchange Bank; he advised the Court that the name of such bank is now Chemical Bank New York Trust Company.

After hearing extensive argument of all counsel and being duly advised in the premises, It Is Ordered, Adjudged and Decreed as follows:

1. The respective motions to quash the subpoenas be and the same are hereby severally denied.

2. The defendant's motion was in the alternative either to quash the subpoenas or to grant modification, and after due consideration, including consideration of the suggestions or comments of various counsel and those of the representative of the Chemical Corn Exchange Bank (now Chemical Bank New York Trust Company), the Court has determined that some modification would be advisable; therefore the subpoenas as issued shall be and hereby are modified in the following particulars:

a. The documents evidencing deposits or withdrawals in the accounts of the various persons specified in the subpoenas which are called for by the subpoenas are limited to deposits or withdrawals of $1,000 or more in United States currency or its equivalent.

b. The period set forth in the subpoenas, which was [fol. 20] from March 14, 1949, to and including November 25, 1959, is amended to the period from March 14, 1949, to and including June 30, 1958.

c. The return date of the subpoenas is changed from December 14, 1959, to 10 o'clock a.m. of January 4, 1960.

3. The defendant's motion to be discharged from custody and to dismiss the proceedings, be and the same is hereby denied, without prejudice.

4. Since this modification of the subpoenas has been announced in open court and all parties concerned were represented before the Court, these modifications of the subpoenas shall stand as the order of this Court without further necessity of personal service, and the parties

concerned shall take notice forthwith of the contents of this order, but counsel for the plaintiff shall serve a copy of this order by mail upon each of the parties upon whom the subpoenas were served, and upon counsel for the individual depositors who have filed their separate motions herein.

5. In the examination of their records and the preparation of information or copies of the same, the said Banks may incur unusual expenses which would not be covered [fol. 21] by the usual witness fees as usually allowed in transactions of this type. If so any of such Banks claiming such unusual expenses may file a motion with this Court setting forth a complete statement of their time and services rendered and the expense thereof, and, unless such expenses can be stipulated to and paid by plaintiff, this Court reserves the right, upon appropriate notice and hearing, to fix a reasonable amount for the reimbursement of said expenses.

6. All proceedings in this cause shall be continued until 10 o'clock a.m. January 4, 1960, at which time the defendant shall present himself in open court.

Wm. C. Mathes, United States District Judge.

December 15, 1959.

[fol. 22]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF GEORGE F. NOLTE—Filed December 16, 1959

State of New York,
County of New York, ss.:

George F. Nolte, being duly sworn deposes and says

1. I am an Assistant Vice President of The First National City Bank of New York with its head office located at 55 Wall Street, New York City.

2. On December 2, 1959 I was served with an undated subpoena duces tecum in this action. The subpoena commands my appearance in Florida on December 14, 1959

with an unreasonably burdensome amount of papers and documents.

This affidavit is submitted in support of a motion for an order which justice requires to protect me from an unreasonable and oppressive demand.

3. Our head office maintains seven open accounts and one closed account for the persons listed in this subpoena. In addition, our Broadway-56th Street branch maintains a regular checking account for another of the persons listed.

4. This subpoena requires copies of checks paid, deposits made, credits and debits to the accounts and statements for over a ten year period, to wit: March 14, 1949 through November 25, 1959. Our branches Recordak, that is, film statements of accounts sent out to depositors. Therefore, for an appropriate search it would be necessary for a man to run through the film until he finds the particular depositor in order to have that statement photographed. This would be necessary for each month for a total of [fol. 23] 128 statements.

5. With reference to obtaining copies of checks paid against the regular checking account involved, it is to be noted that the branch concerned has from 180,000 to 200,000 checks passing through it each month or about 10,000 checks a day. This figure includes regular checking and special checking accounts. All the checks are Recordaked before they are sorted into regular checking, special checking accounts, etc. To find one check would take an average of one day's work to go through the film for the particular day the check was paid. To obtain a copy of the deposit, it would be necessary to go through the entire day's work of deposits for checking accounts to get the particular deposits desired. This, of course, involves taking one or two employees from their regular assignments.

6. As to the eight open and closed accounts at the head office it is estimated that there will be approximately 672 statements. In addition, there are the aforementioned 128 branch bank statements. Each month's statements are bound in a separate book. To obtain one statement for one month an investigator would have to locate the correct book

from among a large number of such books, (most of which are stored in the bank's warehouse), search that book for the particular depositor's statement, take it to the photostat machine, have the book opened and placed under the machine and the statement photostated. It is estimated that it would take the equivalent of one man's time for one [fol. 24] month to obtain all the statements requested in the subpoena for this particular action.

7. The eight accounts at our head office, are maintained on our "Foreign Books", since the depositors are domiciled abroad. On these accounts checks are not returned to the depositor with the monthly statement (as in the case with domestic accounts) but are retained by the bank until requested by the depositor. The checks paid each day are filed as a unit, separated first as to the country of the depositor's domicile, and then alphabetically. In order to obtain the checks paid against each depositor's account, it is necessary to find the date of payment and country of domicile from the statement and then go through the checks paid that day until the particular depositor's check is found.

8. In order to obtain copies of deposit, credit or debit tickets to these accounts, it will be necessary to know which departments made the credit or debit and then request that department to go back through those records for any particular day to extract the one item which it received for credit or for which it made the debit to the account. None of the transactions in the various originating departments are filed alphabetically. Every time a record is withdrawn, the clerk must note on a withdrawal form what was taken and put it in the place of the withdrawn record until such time as the record is returned.

[fol. 25] 9. On the basis of prior experience with lesser requirements, it is estimated that to obtain the records requested herein at least more than a month's working time will be required. The branch bank will have to take at least two employees from regular work and the head office will have to take a minimum of five people from their regular duties to fulfill the requirements of this subpoena, even in such a period of time.

10. The total number of man hours required to produce all the material called for by the subpoena is approximately 1,960, or including supervisory time about 2,000 man hours. It is estimated that seven people working for about forty days, seven hours a day at $2.50 an hour would cost this bank approximately $4,960. This does not include the time and cost of having the necessary photostatic copies made of the records. It will be necessary to detach these trained employees from their regular work in order to respond to this subpoena and to do so will naturally be quite difficult.

George F. Noite

Sworn to before me, December 11, 1959.

Philip D. Ferrall, Notary Public, State of New York, No. 30-6275200, Commission expires March 30, 1960.

[fol. 26]

IN UNITED STATES DISTRICT COURT

ORDER AFTER HEARING OF JANUARY 4, 1960, ON MOTIONS TO QUASH SUBPOENAS, MOTIONS TO EXTEND THE RETURN DAY OF SUBPOENAS, AND OTHER MATTERS—January 4, 1960

This Cause came on to be heard pursuant to the Order on Hearing of December 14, 1959, entered by this Court on December 15, 1959, continuing the hearing herein until January 4, 1960, at 10 o'clock a.m.

The defendant was present in person before the Court, and both the plaintiff and defendant were represented by counsel present before the Court.

Certain named officials of The First National City Bank of New York, the French American Banking Corporation, and the Royal Bank of Canada have heretofore been served with subpoenas which, as subsequently modified, required them to appear and produce records in this cause on January 4, 1960, at 10 o'clock a.m. The aforesaid banks, on December 30, 1959, filed their collective Motion for Extension of the Return Day of the Subpoenas as Modified, in which it was set forth that the movants had filed a notice

of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the order entered in this proceeding on December 15, 1959, denying their motion to quash the subpoenas served upon their officials, and setting [fol. 27] forth further that it would be impossible for some of the movant banks to make the necessary preparations to respond to the said subpoenas by the said return day of January 4, 1960. The movant banks were represented by Mr. Walter Humkey, who was present before the Court.

Upon consideration of this motion, after being duly advised in the premises, it is Ordered, Adjudged and Decreed that the said motion for an extension of the return day be and the same is hereby denied insofar as movants' prayer was based upon their appeal to the United States Court of Appeals for the Fifth Circuit.

Upon further consideration of the aforesaid motion insofar as it seeks a reasonable extension of the return day to enable the said banks to complete their preparations to comply with the subpoenas, and to that extent the plaintiff having raised no objection thereto, it is Ordered, Adjudged and Decreed that the return day of the said subpoenas be extended to January 27, 1960, at 10 o'clock a.m.

The aforesaid extension of the return day shall also apply to the subpoena heretofore issued to a named official of the Chemical Bank New York Trust Company (formerly Chemical Corn Exchange Bank), which subpoena, as modified, was also returnable on January 4, 1960. Counsel for said bank had requested by letter to this Court dated December 30, 1959, that the return day of such subpoena be extended to January 25, 1960, because such [fol. 28] time was found necessary to enable such bank to comply with such subpoena.

The defendant, through his counsel, David W. Walters, asked that his objection to any extension of the return day with reference to any of the subpoenas be noted. Upon due consideration, the said objection of the said defendant shall be and the same is hereby overruled.

All other proceedings in this cause, other than those which are the subject of subsequent paragraphs of this Order, are hereby continued until January 27, 1960, at

10 o'clock a.m., at which time the defendant shall be present in person.

Subsequent to December 15, 1959, certain motions to quash were filed by parties alleging themselves to be depositors in one or more of the banks whose records have been subpoenaed, as follows:

A Motion to Quash on behalf of Fortunato Herrera and Polinversiones, C.A., was filed by their attorney, Mr. Richard H. Hunt, who was represented in Court by Mr Norman Sand. The purpose of said motion was to quash those portions of the subpoenas pertaining to the account or accounts of Fortunato Herrera and Polinversiones, C.A.

Upon consideration of this motion, after being duly advised in the premises, it is Ordered, Adjudged and Decreed that said motion to quash be and the same is hereby denied. [fol. 29] Pedro A. Gutierrez Alfaro and Lola T. De Gutierrez Alfaro, also known as Lola T. De Gutierrez Alfaro, also filed a Motion to Quash, by their attorney, Mr. L. J. Cushman, who was present in Court. The purpose of said motion was to quash the subpoena served upon a named official of the First National City Bank of New York, insofar as said subpoena pertained to the account or accounts of the movants.

Upon consideration of this motion, after being duly advised in the premises, it is Ordered, Adjudged and Decreed that said motion to quash be and the same is hereby denied.

Subsequent to December 15, 1959, Silvio Gutierrez, through his attorneys, Smathers, Thompson & Dyer, filed a Motion to Stay seeking to extend the return day of the subpoena directed to a named official of the Chemical Bank New York Trust Company, insofar as his account in said bank was concerned. The said party had prior to the hearing of December 14, 1959, filed a motion to quash the said subpoena, which motion was denied by this Court in its order of December 15, 1959. In substance the present motion to stay sets forth that said Silvio Gutierrez has filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the order of December 15, 1959, relating to said movant, and asks that, based upon said appeal, this Court extend the return day

of said subpoena. Said Silvio Gutierrez was represented before the Court by Mr. L. S. Bonsteel.

[fol. 30] Upon consideration of this motion, after being duly advised in the premises, it is Ordered, Adjudged and Decreed that the said motion to stay based upon said appeal be and the same is hereby denied, but it is noted that the return day of the subpoena in question has been heretofore in this Order extended to January 27, 1960, at 10 o'clock a.m.

Subsequent to December 15, 1959, Napoleon Dupouy, through his attorneys, Scott, McCarthy, Preston, Steel & Gilleland, filed a Motion to Stay seeking to extend the return day of the subpoenas directed to named officials of the French American Banking Corporation and the First National City Bank of New York, respectively, insofar as his account or accounts in said banks were concerned. The said party had prior to the hearing of December 14, 1959, filed a motion to quash the said subpoenas, which motion was denied by this Court in its order of December 15, 1959. In substance the present motion to stay sets forth that Napoleon Dupouy has filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the order of December 15, 1959, relating to said movant and asks that, based upon said appeal, this Court extend the return day of said subpoenas. Said Napoleon Dupouy was represented before the Court by Mr. Robert J. Beckham.

Upon consideration of this motion, after being duly advised in the premises, it is Ordered, Adjudged and Decreed that the said motion to stay based upon said appeal [fol. 31] be and the same is hereby denied, but it is noted that the return day of the subpoenas in question has been heretofore in this Order extended to January 27, 1960, at 10 o'clock a.m.

During the hearing counsel for the defendant made an oral motion to have the Court order that the plaintiff be required to be personally present at any hearings in this cause at which the defendant is required to be personally present. The Court announced that it was aware of no requirement of law which made the appearance of the plaintiff in Court on a hearing such as this jurisdictional but,

since there was no objection by plaintiff's counsel, it is Ordered that in all further hearings in this cause the plaintiff shall be personally present at such times as the defendant's personal presence is required. After this matter was raised by the defendant's counsel at the hearing, the plaintiff's counsel communicated with the plaintiff who came to the hearing and was personally present during the remainder thereof.

Done and Ordered this 4th day of January, A. D., 1960.

Wm. C. Mathes, United States District Judge.

[fol. 32]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed December 29, 1959

Notice is hereby given that The First National City Bank of New York, The French American Banking Corporation and The Royal Bank of Canada, each of which has been served with Subpoena Duces Tecum, to appear and produce records at an extradition proceeding in the above styled court on January 4, 1960, issued at the instance and request of the plaintiff above named, each hereby appeals to the United States Court of Appeals for the Fifth Circuit from that portion of the Order dated December 15, 1959 and entered in said extradition proceeding on December 15, 1959, denying the motion of each of said banks to quash the said subpoena which had been served upon it.

Dated at Miami, Florida this 29th day of December, 1959.

The First National City Bank of New York by Shearman & Sterling & Wright and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; French American Banking Corporation by Coudert Bros. and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; The Royal Bank [fol. 33] of Canada, by Sage, Gray, Todd and Sims and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey.

[fol. 36]

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON APPEAL—Filed January 12, 1960

First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada, herewith designate the points upon which they contend the Court erred:

1. The Court erred in denying the motion of First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada, to quash the [fol. 37] subpoena duces tecum served upon each of them in the within proceeding.

2. The subpoena power of the United States District Court cannot be exercised on behalf of the demanding Country in an extradition proceeding.

3. The United States District Court has no power to issue in such a proceeding a subpoena for service upon a witness outside the district in which the said court is located and not within one hundred miles of the place of hearing.

The First National City Bank of New York by Shearman & Sterling & Wright and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; French American Banking Corporation by Coudert Brothers, and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; The Royal Bank of Canada by Sage, Gray, Todd and Sims and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey.

[fol. 42]

IN UNITED STATES DISTRICT COURT

SUBPOENA—Filed December 14, 1959

To: George F. Nolte, Assistant Vice-President, The First National City Bank of New York, 55 Wall Street (20 Exch. Pl.), New York, N. Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

You Are Hereby Commanded to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N.E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; Provided that such appearance need not be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies. [fol. 43] If counsel for the plaintiff or defendant take copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.

the contents of such copies shall not be disclosed by such counsel to any person other than the plaintiff or the defendant herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

Wm. C. Mathes, U.S. District Judge.

November 25, 1959

RETURN ON SERVICE

Received this writ at New York, N.Y. on Dec. 2, 1959 and on Dec. 2, 1959 at 20 Exchange Place, N.Y.C. New York, N.Y., I served it on the within-named George F. Nolte, Asst. Vice-Pres. The First National City Bank of N.Y. by leaving a copy thereof and ck. for $119.68 with him.

Thomas J. Lunney, U. S. Marshal, SDNY, By: [fol. 44] Harry J. Cant, Deputy U.S. Marshal, SDNY.

Marshal's Fees

Travel	$ .30
Service	.50
	$ .80

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) deposited or credited from March 14, 1949 to November 25, 1959 (inclusive) to each account maintained in the First National City Bank of New York (including its predecessor the National City

Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the First National City Bank of New [fol. 45] York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949 to November 25, 1959 (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
[fol. 46] Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas

Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Appelwhite
Polinversiones, C.A.
Edificio Washington, C. A.

7. The foregoing paragraphs shall not require production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

[fol. 47]

IN UNITED STATES DISTRICT COURT

SUBPOENA—Filed December 14, 1959

To: Walter Anderson, Secretary, French American Banking Corporation, 31 Nassau Street, New York City, N. Y.

On motion of the plaintiff, supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

You Are Hereby Commanded to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N. E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; Provided that such appearance need not be made if, prior to December 14, 1959, such documents,

[fol. 48] records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

If counsel for the plaintiff or defendant takes copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.
Banco Provincial de Venezuela,

the contents of such copies shall not be disclosed by such counsel to any person other than the Plaintiff or the Defendant herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

Wm. C. Mathes, U. S. District Judge.

November 25, 1959

RETURN ON SERVICE

Received this subpoena at New York City on Nov. 30, [fol. 49] 1959, and on Dec. 3, 1959 at 120 Broadway, NYC, served it on the within named Walter Anderson, Secretary, by delivering a copy to him and tendering to him the fee

for one day's attendance and the mileage allowed by law. (ck 119.68)

Thomas J. Lunney, U.S. Marsh., By Harry J. Cant, Deputy.

Dated: 12/3/59

Service Fees

Travel	$
Services	
Total	$.....

Subscribed and Sworn to before me, this 4th day of December, 1959.

Frank P. Costa, Notary Public, State of N. Y., No. 03-5829350, Qualified in Bronx County, Commission expires March 30, 1960.

(Notarial Seal)

U. S. Marshal, S. D. N. Y.

Fees	.50
Mileage	.30
Expenses	—
Total	.80

[fol. 50]

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts, and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts, and bills of exchange (both sides) deposited or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in the French American

Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the French American Banking Corporation in the name [fol. 51] or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez

Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A
Edificio Washington, C.A.

[fol. 52] 7. Originals or copies of all records, statements of account, deposit slips, acknowledgments, advices or notations of deposit, credit, debit, transfer or withdrawal, and memoranda, instructions, correspondence, and all other records and written communications and all records of any oral communications, whether internal or external, from March 14, 1949 to November 25, 1959 (inclusive) relating to the entire transaction or series of transactions of French American Banking Corporation with the Banco Provincial de Venezuela that are referred to in a letter of December 1, 1954 from Marcos Perez Jimenez to French American Banking Corporation, and in French American Banking Corporation's reply and enclosure of December 7, 1954.

8. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

[fol. 53]

IN UNITED STATES DISTRICT COURT

SUBPOENA—Filed December 14, 1959

To: J. W. Ganaan, Agent, Royal Bank of Canada (New York Branch), 68 William Street, New York, N. Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

You Are Hereby Commanded to appear in the United States District Court for the Southern District of Florida,

Miami Division, at the Federal Building, 300 N. E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; Provided that such appearance need not be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

If counsel for the plaintiff or defendant takes copies of any documents, records or other materials with respect [fol. 54] to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.

the contents of such copies shall not be disclosed by such counsel to any person other than the plaintiff or the defendants herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

Wm. C. Mathes, U. S. District Judge.

November 25, 1959.

RETURN ON SERVICE

Received this subpoena at New York City on Nov. 30, 1959 and on December 3, 1959 at 68 William Street, NYC served it on the within named J. W. Ganaan, true name

J. W. Ganann, agent, by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.

Thomas J. Lunney, U.S. Marsh., By Harry J. Cant, Deputy.

Dated: December 3, 1959

[fol. 55]

Service Fees

Travel $

Services

Total $.....

Subscribed and Sworn to before me, this 4th day of December, 1959.

Frank P. Costa, Notary Public, State of N. Y., No. 03-5829350, Qualified in Bronx County, Commission expires March 30, 1960.

U. S. Marshal, S. D. N. Y.

Fees .50

Mileage .30

Expenses

Total .80

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

[fol. 56] 2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) deposited

or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclu- [fol. 57] sive) with respect to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud

Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.

7. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 65]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

NOTICE OF DEPOSITION—Filed November 12, 1959

Please take notice that plaintiff demands that The First National City Bank of New York appear at 10:30 A.M. on November 16 1959, at Room 601, United States Court

House for the United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of George F. Nolte, Assistant Vice-President of The First National City Bank of New York, and of any other officer [fol. 66] or employee having knowledge of the facts, pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

Howard C. Westwood, David C. Acheson, Attorneys for Plaintiff, 701 Union Trust Building, Washington 5, D. C.

Of Counsel: John Logan O'Donnell, Esq., Olwine, Connelly, Chase, O'Donnell & Weyher, 52 Vanderbilt Avenue, New York 17, New York.

Affidavit of Service (omitted in printing).

[fol. 67]

IN UNITED STATES DISTRICT COURT

NOTICE OF DEPOSITION—Filed January 15, 1960

Please take notice that plaintiff demands that the French American Banking Corporation appear at 10:30 a.m. on November 17, 1959, at Room 601, United States Court [fol. 68] House for the United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of Walter Anderson, Secretary of the French American Banking Corporation, and of any other officer or employee having knowledge of the facts, pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

William G. Ward, 1240 Dupont Building, Miami, Florida; David C. Acheson, 701 Union Trust Building, Washington 5, D. C., Attorneys for plaintiff.

Of Counsel: John Logan O'Donnell, Esq., Olwine, Connelly, Chase, O'Donnell & Weyher, 52 Vanderbilt Avenue, New York 17, New York.

To: David W. Walters, Esq., Walters, Moore & Costanzo, 1008 Ainsley Building, Miami 32, Florida, Attorney for defendant.

[fol. 69] Affidavit of Service (omitted in printing).

[fol. 70]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR PROTECTIVE ORDER, PURSUANT TO RULE 30(b), FEDERAL RULES OF CIVIL PROCEDURE—Filed November 12, 1959

Comes Now the defendant, by and through his undersigned attorney, and makes this his motion for a protective order, prohibiting the taking of the depositions of George F. Nolte, Assistant Vice-President of The First National City Bank of New York, and other unknown officers and employees of that bank, at 10:30 A.M., November 6, 1959, at Room 601 United States Courthouse for the United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, New York, New York, pursuant to a notice of deposition received from attorneys for the plaintiff under date of November 11, 1959, and for reasons thereof states:

1. That the notice of deposition fails to meet the legal requirements imposed by Rule 15 of the Federal Rules of Criminal Procedure, for the reason that there has been no showing made to the Court that the witnesses' testimony is material and that it is necessary to take their deposi-

tions in order to prevent a failure of justice, and that no [fol. 71] order of the Court has been entered giving leave for the taking of said depositions, as required by Rule 15 (a) of the Federal Rules of Criminal Procedure.

2. That the notice of deposition fails to meet the legal requirements of Rule 15(b) of the Federal Rules of Criminal Procedure, inasmuch as the notice thereof is both unreasonable and fails to state the name and address of *each* person to be examined.

3. That the notice of deposition indicates that the deponents are officers and employees of The First National City Bank of New York, and no showing as to the materiality or the relevancy of their testimony has been established; however, presupposing that the testimony elicited will concern matters of privacy and secrecy concerning the deposits or banking transactions of the defendant with the bank, then and in that event, failing an order of the Court for the taking of the depositions, the proceedings would be violative of the Fourth and Fifth Amendments to the Constitution of the United States.

Wherefore, defendant makes this his motion to the Court for a protective order, pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, to the effect that the deposition shall not be taken unless upon order of the Court, and that the notice of taking deposition be vacated as fatally defective.

[fol. 72] Walters, Moore & Costanzo, Attorneys for Defendant, By David W. Walters.

Certificate of Service (omitted in printing).

IN UNITED STATES DISTRICT COURT

ORDER VACATING DEPOSITION NOTICE AND SUMMONSES—Entered November 13, 1959

This Cause having come on to be heard on motion of the defendant for a protective order, and the Court having heard the arguments of counsel and being duly advised in the premises, and it being the opinion of the Court that for

[fol. 73] counsels' guidance and in the interest of proper administration of justice in this cause and within the Court's discretion that fixed rules of procedure should be established for all matters relating to this cause and the Court being of the further opinion that the Federal Rules of Criminal Procedure are the most appropriate for the most part, as opposed to Federal Rules of Civil Procedure, it is hereby

Ordered, Adjudged and Decreed that as may relate to this particular cause all matters of procedure will be subject to the provisions of the Federal Rules of Criminal Procedure as they may apply and the Federal Rules of Civil Procedure will not apply, and it is further

Ordered, Adjudged and Decreed that the Notice of Taking Depositions of George F. Nolte, Assistant Vice-President of The First National City Bank of New York, and other unknown officers and employees of that bank, at 10:30 A. M., November 6, 1959, at New York, and all summonses connected therewith, be and the same are hereby vacated, the taking of testimony pursuant to said notice and summonses prohibited, and the parties concerned protected against failure of non-compliance therewith.

Done and Ordered at Miami, Florida, this the 13th day of November, 1959.

Emett C. Choate, Judge, United States District Court.

[fol. 74]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR THE ISSUANCE OF SUBPOENAS—Filed November 25, 1959

Omitted. This matter appears on printed page 4, side folio 6, ante.

[fol. 77]

IN UNITED STATES DISTRICT COURT

DEFENDANT, MARCOS PEREZ JIMENEZ'S MOTION TO QUASH OR MODIFY SUBPOENAS—Filed December 8, 1959

Comes Now the defendant, Marcos Perez Jimenez, by and through his undersigned attorney, and on behalf of himself, his wife and children, makes this his motion to

quash or modify the subpoenas duces tecum served upon Walter Anderson, Secretary, French American Banking Corporation; Wallace M. Davis, President of the Hibernia National Bank in New Orleans; J. W. Gannan, Agent, Royal Bank of Canada (New York branch); Isaac B. Grainger, President, Foreign Exchange Bank; and George F. Nolte, Assistant Vice President, First National City Bank of New York, to produce among other things bank records pertaining to the defendant, his wife and children covering the period March 14, 1949 to November 25, 1959, inclusive, on the ground that compliance would be unreasonable and oppressive to the detriment of the defendant for the following reasons, to wit:

[fol. 78] 1. That the records sought to be produced are incompetent, irrelevant and immaterial;

2. That the complaint charges embezzlement or criminal malversation for a period between 1948 and January 23, 1958, and all bank records and transactions from January 23, 1958 until November 25, 1959, as required in the subpoenas to be produced, are incompetent, irrelevant and immaterial to the proceedings;

3. That the issuance of a subpoena as an aid to an investigation by the plaintiff in the conduct of extradition proceedings is illegal and improper;

4. That the providing of an opportunity to the plaintiff to have unlimited access to unlimited documents of a personal and private character, the property of the defendant, his relatives, friends and various former associates is oppressive and unreasonable, and the information derived therefrom is likely to prejudice the personal interests and welfare of each and every party concerned in some form of reprisal by the Venezuelan Government against these individuals in matters completely unrelated to these proceedings.

[fol. 79] Wherefore, the defendant prays that the subpoenas be quashed or modified as justice would best serve.

Walters, Moore & Costanzo, Attorneys for Defendant, By David W. Walters.

Certificate of Service (omitted in printing).

[fol. 80]

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF RETURN DAY OF SUBPOENA AS MODIFIED—Filed December 29, 1959

The First National City Bank of New York, The French American Banking Corporation and The Royal Bank of Canada, show unto the Court that each of the movants has heretofore been served with subpoena Duces Tecum to appear and produce records in the above-styled extradition proceeding; that the said subpoena was modified by order of this Court entered December 15, 1959; that the return day of the said subpoena as modified is January 4, 1960, at 10:00 o'clock A.M. in the above-styled court; that some of the movants have been unable to make preparations adequate to enable them to respond as required by the subpoena and within the time designated as the return day, to wit: January 4, 1960; that each of the movants has this day filed Notice of Appeal from that portion of the order entered in this proceeding on December 15, 1959 denying the motion of each movant to quash the said subpoena; that it will be impossible to make the necessary preparation to respond to the said subpoena by the said return day.

Wherefore, the movants pray that the court will enter an order herein further modifying the said subpoena to extend the return day indefinitely and until the movants [fol. 81] have had the opportunity of presenting the said portion of the Order of December 15, 1959, for review by the United States Court of Appeals for the Fifth Circuit, either by way of said appeal or by Application for an Extraordinary Writ, as the case may be and until a time subsequent to final disposition of the said appellate review.

The First National City Bank of New York by Shearman & Sterling & Wright and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; French American Banking Corporation by Coudert Bros. and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; The Royal Bank

of Canada, by Sage, Gray, Todd and Sims and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey, 401 Industrial National Bank Bldg., Miami, Florida.

[fol. 82]

IN UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

Excerpts of Transcript of Hearing—November 23, 1959

The above-entitled matter came on for hearing before the Honorable William C. Mathes, Judge of the United States District Court, at Miami, Florida, on Monday, November 23, 1959, commencing at 10 o'clock a.m.

APPEARANCES:

W. G. Ward, Esq., of the firm of Ward & Ward and Howard Westwood and Sidney Sachs, Esqs., Appearing on behalf of the Plaintiff.

David W. Walters and Edward N. Moore, Esqs., of the firm of Walters, Moore & Costanzo, Appearing on behalf of the Defendant.

• • • • • • •

[fol. 83] Afternoon Session

2 o'clock p.m.

Thereupon: The following proceedings were had:

COLLOQUY BETWEEN COURT AND COUNSEL RE ISSUANCE OF A SUBPOENA FOR THE PRODUCTION OF THE PAPERS IN QUESTION, ETC.

The Court: Before the noon recess we were discussing the motion for a bill of particulars.

Mr. Westwood: Your Honor, Mr. Walters and I have discussed the matter over the recess on this question of subpoenas. I have a suggestion to make which, as I understand it, Mr. Walters is agreeable to except, of course, this wouldn't in any way affect his rights to object on other grounds, but the suggestion is this: That your Honor issue a subpoena for the production of the papers in question.

Mr. Walters: Under the Criminal Rules.

Mr. Westwood: Yes, under the Criminal Rules.

The Court: Do the pleadings say anything on this?

Mr. Westwood: No, your Honor.

Mr. Walters: I think we can probably agree that the procedure is pretty much yours. You are charged with the responsibility of creating a record which is equivalent to a commitment proceeding, preliminary proceedings.

The Court: Preliminary hearing.

Mr. Walters: And the laws, for the most part, seem to indicate that is pretty much your discretionary power. [fol. 84] The Court: I thought there was something in the pleadings and I did not remember what it was.

Mr. Walters: It says that the Court will proceed to establish evidence of criminality, legal evidence of criminality on the basis of the laws of this country.

Mr. Westwood: It may be that your Honor had in mind the provision of Article 11, the second sentence of the third paragraph thereof which says: "The judicial functionary shall prescribe the method of complying with the legal formality of the country of which the extradition is requested." That particular language may or may not have had this kind of problem in mind, but it would seem not unreasonable to embrace the idea that the Judge in an extradition hearing can determine how the process is to proceed.

Mr. Walters: I do not quarrel with the power of the Court or the power of the subpoena under the Criminal

Rules for a man that is present, where the documents are presented at the hearing. I have some quarrel whether or not depositions are proper. I felt that the Statute does not cover the depositions in this country.

Mr. Westwood: Well, our thought, your Honor, was that a subpoena could be issued and perhaps have right in the subpoena itself a proviso that if the plaintiff and defendant are permitted to examine the documents and to [fol. 85] make copies of such of them as they care to, then it will be unnecessary to produce the documents in response to the subpoena.

The Court: Do you contemplate a showing by affidavits such as Rule 17(b) requires, 17(b) of the Rules of Criminal Procedure, that is, a showing of the evidence, the material—

Mr. Westwood: Yes, your Honor.

The Court: Of course, this refers to a defendant's subpoena—material to the defense.

Mr. Westwood: The indigent defendant's provision.

The Court: Yes.

Mr. Westwood: That 17(b) has to do with the provision of the indigent defendant.

Mr. Walters: I can't make that claim exactly after the presentation that counsel has been making.

The Court: I am not referring to that, but I am thinking of the showing, the maximum showing that will be required and the affidavit was made and the affidavit was served along with the subpoena. It might help meet such a situation.

Mr. Westwood: Yes, sir.

The Court: It might help meet such a situation en- [fol. 86] countered in the letter I called your attention to this morning.

Mr. Westwood: Actually, your Honor, the letter refers to the Banco Provisional, Venezuela. We do not propose to ask for those documents anyway. I think that would probably eliminate the principal problem.

Mr. Walters: I also received a letter from the counsel of the First National Bank in New York which is a similar report and perhaps I also ought to have that included in here. It was directed to me, but for what reason I don't know, because I do not have any control over Perez, because I was resisting it, but they make a similar protest.

The Court: Do you wish to file it?

Mr. Walters: Yes, I think it may be a good idea.

The Court: You may file that.

Mr. Westwood: My thought, your Honor, and this is what Mr. Walters and I discussed, as I said, if the subpoena actually has in it a proviso relieving them of the need to produce the documents in the event we can examine them and make copies, that ought to eliminate most of the problem.

The Court: Yes, I should think so.

Would this be a subpoena to bring the records here to the hearing?

[fol. 87] Mr. Walters: Yes.

Mr. Westwood: It would say bring the records here on a date set forth and then there would be a proviso relieving them of that obligation if the permission to examine and to copy were afforded, unless something very unexpected were to arise. I think Mr. Walters and I both feel that there would be, in all likelihood, the inspection and that the problem either would entirely disappear or later on, if there remains any problem, it would be of a much narrower compass.

The Court: Well, we could fix a return date on it and continue this hearing, I suppose, until the 14th of December.

Mr. Westwood: Yes.

The Court: Do you think you would be ready by then? If not, we will continue it to the following Monday.

Mr. Westwood: Yes, we could aim at that and have that as the return date. I am sure before that time the problem will have been pretty much clarified. If any question remains we can come back to your Honor with it.

The Court: Very well. In view of that, gentlemen, I think it might be well to enter an order denying the motion for a bill of particulars at this time with leave of the defendant to renew the motion or to bring in a different motion in the future some time.

[fol. 88] Mr. Walters: There is only one matter I think we have to have some caution on and that is I have not received a copy directly of the other subpoenas. There are a number of people whose records are requested from the bank and I don't know whether or not, for their interest,

that copies should be made that might find their way back to Venezuela which might prejudice those individuals. They happen to be mostly Venezuelans and from a standpoint of making copies, I don't know whether that might be proper. It is not ordinarily permitted to make copies of those.

The Court: If you gentlemen can agree upon a protective order it seems to me it might be well. Upon making the copies counsel, of course, is responsible for them without the consent of the order of the Court.

Mr. Westwood: Yes, I would think that would make good sense, your Honor, because certainly there is no disposition to make any ulterior use of this material.

The Court: And that would still protect the interest of your client, too. Do you suppose you could formulate some such order?

Mr. Westwood: I think we can.

The Court: You do not need to recite these are made on stipulation. You both will just approve of them in form and I will make the order on the plaintiff's motion.

[fol. 89]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-Civil

[Title omitted]

Miami, Florida
December 14, 1959

Excerpts of Transcript of Hearing—December 14, 1959

The above-entitled matter came on for further hearing before the Honorable William C. Mathes, Judge of the United States District Court, at Miami, Florida, on Monday, December 14, 1959, commencing at 10 o'clock a.m.

APPEARANCES:

As heretofore noted.

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[fol. 90] The Court: Mr. Westwood, I think it might facilitate matters to hear you in defense of the subpoenas first.

STATEMENT ON BEHALF OF PLAINTIFF BY MR. WESTWOOD IN DEFENSE OF THE SUBPOENAS

Mr. Westwood: Very well.

If your Honor please, I don't like to start in an argument with an apology; but since I saw the documents so recently, I may not be as tight-knit as I would be if I had had further preparation.

First of all, there is a motion by the defendant which raises one of the questions, as I see it. Then there is a motion by three of the banks which have the documents in their possession. And then there are motions, I believe, by two depositors, one of whom is a depositor in one of the banks that has not made a motion, which, I think, may have somewhat different considerations bearing upon it.

It will facilitate, I believe, an understanding of just what the issues are if we go back and refresh our recollection as to how we got to this point.

On or about the 9th of November, we, as counsel for the plaintiff, served a notice of taking deposition on one of the banks which has now filed a motion attacking the subpoena. I should know, but I don't recall just now whether we had served notice on any of the other banks at that time or not. But it was apparent that we had that in mind. [fol. 91] That notice was served as contemplated by the Federal Rules with respect to ordinary deposition.

Of course, counsel for the defendant became aware of the proposal to take such depositions and then filed in this court a motion which, in effect, was an attack on the whole proposal. His position was that the Federal Rules were not applicable. It was his position that the Civil Rules were not applicable and that a deposition procedure was not permissible in a proceeding of this kind.

That motion by the defendant came on for hearing before Chief Judge Choate, your Honor having been absent from the city. Judge Choate entered two orders: The first order was entered immediately upon conclusion of the ar-

gument on the defendant's motion, as I recall it, and was dated on or about November 13th. I may be a little off on my dates. But in any event, it stated that it is ordered that all matters of procedure will be subject to the provisions of the Federal Rules of criminal procedure as they may apply, and the Federal Rules of civil procedure will not apply.

He then had his order go on and he prohibited the taking of the depositions. There had been oral colloquy in the course of argument before the Chief Judge in which it was recognized that this was an important question and that it might not be free from doubt. There had been some discussion of the possibility of an appeal. Upon reading [fol. 92] the order of the Chief Judge and finding in it nothing as to permission to appeal, counsel for the plaintiff filed a motion or a request asking that the order be modified so as to permit an appeal which, as your Honor knows, is necessary to perfect in a matter of this kind at this stage. At least, I think it is.

The Court: Under the Interlocutory Appeal Act.

Mr. Westwood: Yes, your Honor.

That matter, I believe, was not orally argued; or was it?

Mr. Ward: Yes.

Mr. Westwood: There was an oral presentation and discussion of that motion before the Chief Judge which again I think was on the—I don't remember whether it was the week before November 23rd or not. As a result of that discussion, the Chief Judge entered a second order. The terms of the second order are very important. That order bears, your Honor, the date of November 23rd, which was the Monday when your Honor returned to the city and we had the previous proceedings before your Honor. It is short and perhaps it would be helpful if I read it, because it superseded his previous order.

It states: "This cause coming on to be heard upon petition of the plaintiff to amend the protective order of November 13, 1959, and the pronouncement therein; and the court being advised in the premises, the court is of the [fol. 93] opinion that the order entered on November 13th, ordering that the procedure for taking of depositions of witnesses in the United States, as permitted under the Fed-

eral Rules of Civil Procedure, should not apply, and the procedure is to be governed as stated in the Treaty. The court is of the opinion that the right of subpoena exists as relates to witnesses and further that the court may, by order, provide for the securing of testimony where a witness cannot be secured to appear before the Court.

It is ordered, adjudged, and decreed that the order of November 13, 1959, entered in the above cause, be and the same is hereby vacated in so far as it relates to the establishment of special Rules governing procedure in the above-styled case."

So that completely superseded the previous order and, as I understand it, states or recognizes that an extradition proceeding is one conducted pursuant to the terms of the Treaty and that that one does not simply impose the Federal Criminal Rules as the procedure that shall be followed, which was the position that had been taken in the order of November 13th.

Now, thereupon, discussion occurred before your Honor, on November 23rd with respect to this matter of seeking to get at the records in the banks. Before your Honor at that time I endeavored to make clear on behalf of the [fol. 94] plaintiff that the immediate problem was to see the records and to see if copies could be made of them. It made no difference to us, as a practical matter, whether it was under the criminal Rules or the civil Rules. If copies could be made both by the defendant, if he desired, and by the plaintiff, that would meet the immediate problem. So that the issue actually was before your Honor and was a very narrow one.

We had a discussion of that matter prior to the noon recess before your Honor. Your Honor will recall that in the course of colloquy it appeared that perhaps Mr. Walters and I could discuss the matter and some solution to the problem would evolve.

I would like to refresh your Honor's recollection as to what Mr. Walters, attorney for the defendant, said at that time. I am referring to the transcript of those proceedings, beginning at page 65, which is immediately after the noon recess.

At the beginning of the afternoon session, I opened with a statement that Mr. Walters and I had discussed the matter and that I had a suggestion which I thought Mr. Walters would find agreeable subject, of course, to the reservation of his rights. Mr. Walters then indicated that he was thinking of a proceeding which would be more or less modeled under the Criminal Rules.
[fol. 95] The Court said:

"The Court: Do the pleadings say anything on this?" That is an obvious mistake. What the Court said was: "Does the Treaty say anything on this?" The word "pleadings" is substituted for "Treaty" in one or two places on subsequent pages.

It goes on:

"Mr. Westwood: No, your Honor."

Then later, as I will point out, I recall what your Honor probably had in mind.

Then Mr. Walters said:

"Mr. Walters: I think we can probably agree that the procedure is pretty much yours. You are charged with the responsibility of creating a record which is equivalent to a commitment proceeding, preliminary proceedings.

"The Court: Preliminary hearing.

"Mr. Walters: And the laws, for the most part, seem to indicate that is pretty much your discretionary power.

"The Court: I thought there was something in the pleadings—" should be "Treaty"—"and I did not remember what it was."

Then it goes on:

"Mr. Walters: It says that the Court will proceed to establish evidence of criminality, legal evidence of crim-
[fol. 96] inality on the basis of the laws of this country."

And I referred to that portion of Article 11 of the Treaty which your Honor may have had in mind. Then note this:

"Mr. Walters: I do not quarrel with the power of the Court or the power of the subpoena under the Criminal

Rules for a man that is present, where the documents are presented at the hearing. I have some quarrel whether or not depositions are proper. I felt that the Statute does not cover the depositions in this country."

Without attempting to read into Mr. Walters' theory what he may have had in mind—although I think it is apparent—I might suggest this which I think would help in understanding. There is some question perhaps as to whether the deposition procedure under the Federal Rules would be appropriate in that there is the question of the confrontation by the defendant of the witness. I am going to come to that later in the argument.

But I think that may be one reason that Mr. Walters was drawing a distinction between proceeding under the criminal rules and under the civil rules. In any event, the important thing is that Mr. Walters made it very clear. He says, "I do not quarrel with the power of the Court."

Now, it was as a result of our agreement in this col- [fol. 97] loquy with your Honor—and remember we then considered the terms of the Treaty in Article 11 to which I referred—that Mr. Walters and I continued to discuss the matter with your Honor. And as a result of that discussion the suggestion arose that a proviso be included in a subpoena to be issued by your Honor which would make it unnecessary for the actual production of the documents here if the inspection and copying were permitted prior to the return date.

Then at the end of the discussion, along about page 70 or 71 of the transcript, Mr. Walters mentions the problem of third parties who might be concerned about their records being examined, lest there be a retaliation in Venezuela. I made it clear on behalf of the Government of Venezuela that no such thought was in mind.

I think it was your Honor that suggested a protective provision which, in fact, later was included in the subpoena which provided that as to the persons other than the defendant and the members of his family, neither counsel for the plaintiff nor counsel for the defendant, upon the inspection, would be permitted to disclose any of the infor-

mation as to their accounts to persons other than the plaintiff himself and the defendant himself.

I may say that I construe the plaintiff to mean Manuel Aristeguiera personally, and not to embrace other persons [fol. 98] in the Venezuelan Government; so that any such information would be disclosed only among counsel until and unless there is material which, of course, is to be offered in evidence.

As a result of this rather lengthy discussion before your Honor, your Honor suggested that an order for a subpoena be drafted, which was done. I took the liberty of drafting an order pursuant to your Honor's suggestion. There was an affidavit also which later was executed by my brother counsel, Mr. Sachs, which was presented later to your Honor, covering both the order on the issuing subpoenas and the motion for the issuance, which was just a one-sentence matter that referred to the affidavit that was attached. The affidavits were shown to Mr. Walters ahead of time and we, of course, had a conference. Mr. Walters and I had a conference in his office and then called your Honor and made a date to see your Honor in chambers Wednesday afternoon, November 25th. We did meet then with Your Honor, and Mr. Walters and I and the subpoenas were gone over by your Honor. Your Honor went over the subpoena at that time in chambers, and Mr. Walters and I were present. The terms of the subpoena were very clear.

Now, I have gone into this in some detail, your Honor, because the motion filed on behalf of the defendant—and your Honor will pardon me if I do not carry in my mind its exact terms, was in effect an attack upon the whole sub- [fol. 99] poena on all grounds, I believe.

I would simply make the point that the defendant has waived the objection that the defendant now asserts. Most certainly the defendant, if it did have objection to the breadth of the subpoena or its terms or what was covered, should have made that point on November 23rd, 24th and 25th, when we had this matter up with your Honor before.

I hope I am never going to be in a proceeding technical or hairsplitting, but I think this is a bit more than a technicality. I think that where this matter was done as it was,

in so far as the defendant is concerned, there was full notice, full consideration, and a very deliberate position taken by the defendant and it was apparently on the face of that, that your Honor took the action that your Honor did.

Now, by this recital of history, I do not mean to imply that I am not coming to the question of your Honor's power. But before coming to that, I want to make only one observation as to those considerations which are applicable to the motions filed on behalf of the banks and on behalf of the depositors. This may not be true of the motion on behalf of the banks; it is true in the motion on behalf of the two depositors, I believe, as I recall them. They raised points which clearly they are in no position to urge.

They talk about the matter not being relevant and not [fol. 100] being material to the case. That is none of their business, if I may be blunt. At the most they can only raise questions of their personal privilege if they have such. That is not disclosed in their position or in their motion.

Perhaps, although I am not even sure of that, they can raise questions as to the jurisdiction of power of the Court. I am not sure that they can even do that. The only thing that I am sure of is that they are in a position to raise a question as to the oppressiveness of the subpoenas.

If we are looking to the Rules, either Civil or Criminal, as a kind of guide as to how to proceed in this matter, clearly they have not complied with the Rules, either the Civil or the Criminal Rules, because in both sets of Rules where it is recognized that a subpoena may be quashed or attacked on the ground that it is oppressive, it is perfectly plain that the person attacking must make a showing to that effect, and that requires something substantial, not just their bare statement that there is something oppressive.

Furthermore—and again I am not going to be technical —I am almost positive, your Honor, that upon discussion with counsel representing these parties, it would be very easy to arrive at a limitation which would be practical, which would achieve the objectives and which would completely eliminate any matter of oppressiveness.

[fol. 101] For example, let us assume that in some of these accounts there were a great many transactions involving checks for small sums of money. Obviously, we have no interest in prying into transactions of that sort. And I am sure that an understanding could be arrived at which would limit the examination of transactions to those exceeding a certain figure. And from what I know of the banks records and from the inquiries that I have made of one of the banks, I feel quite sure this must be true, and an entirely proper limitation of that kind would, I believe, really eliminate any serious suggestion of oppressiveness that there might be.

So by making the point that there has been a failure on the part of these parties to comply with the burden imposed upon them by the Rules to make a positive showing of oppressiveness, I do not mean that I am going to be technical and stand on my rights. I am perfectly willing to and indeed have contemplated all along that we can, in the light of the situation that may be found with respect to particular accounts, work out a feasible limitation which make compliance not oppressive at all.

Now, I have sketched the position of the defendant, what I believe to be the limitations upon the defendant, and the position of the other objectors and what I believe to be the limitations upon them. I now want to address myself [fol. 102] to the basic question of this court's power, a question which indeed I think was decided by the Chief Judge.

In discussing that, I want to make our position quite clear. As pointed out in the motion filed on behalf of the three banks, it has been decided over and again that an extradition proceeding is not a criminal proceeding. Indeed it is a proceeding civil in nature. It is for that reason—and there seems to be an echo of agreement in the motions filed on behalf of the three banks—that at the outset we took the position from which we do not retreat, to which we adhere, that the Civil Rules are, in fact, applicable and that this matter could and properly would be handled by notice of deposition.

The Chief Judge disagreed with that view. Leaving aside the terms of his order of November 13th and coming

to the superseding order which is dated November 23rd, I take it that the Chief Judge's view was not necessarily that the Civil Rules did not apply or that the Criminal Rules do apply; but rather that the source of power is the Treaty; and that the extradition court has a rather broad discretion to proceed in a manner that appears to it to be appropriate. That view makes very good sense.

And I am not sure that I would be disposed, even though I might feel that the Civil Rules really do apply and that [fol. 103] we are right in our original position, as a practical matter I would be disposed to argue against that view; because what we are trying to do is achieve an objective.

I feel that the discretion of the extradition court will be wisely exercised. And it may well be that there is some particular provision of the Civil Rules that would seem to be inappropriate or some provision of the procedure under the Criminal Rules that might seem to be more appropriate and that the extradition court in its discretion would want to follow one course rather than the other.

I am not sure that I would ever want, as a practical matter, to argue against that point of view. Furthermore, there is this to be said—and I come back to what I say was in Mr. Walters' mind when he originally objected to the application of the Civil Rules. That is the question of whether the defendant has a right to be confronted by the witnesses.

In an ordinary criminal proceeding there is this right of confrontation. It may be that there is some problem with respect to the taking of depositions as the Civil Rules contemplate in ordinary cases with respect to the matter of confrontation.

I may say, however, that I do not for a moment admit that the right to confrontation does exist in an extradition [fol. 104] proceeding. But I can see perfectly good sense in pursuing a course that avoids unnecessarily raising that question, because I was thinking of achieving a practical end in a way.

Also, it is always wise to decide not more than is necessary or to anticipate matters that might arise in the future. It struck me that the course which was worked out after this colloquy with your Honor in court and consultation

between Mr. Walters and me and ultimately adopted by your Honor in chambers with Mr. Walters and me present, regardless of what was the particular source of power or regardless of the force of the Civil Rules or the Criminal Rules or whatnot, under any view of the matter, what was done was within the Court's power and appropriate. And I certainly didn't care which view at that time was adopted as the rationalization or the basis of the Court's power, because as we all made very clear at the moment, the only problem was to look at the record and then determine where we go from there.

Now, let me come to the matter of the Court's power.

The Court: This might be a good point to suspend for the noon recess.

Mr. Westwood: Very well.

Mr. Walters: I would like to just say a word with re- [fol. 105] gard to that prior to the recess, if I could, so that we will have a clear picture of the factual situation.

The Court: Yes, you may, of course; but even assuming arguendo that the defendant might have waived, the other moving party did not waive any rights they had to challenge the power of the Court within the limits of privilege for the production of documents.

Mr. Walters: I thought I made it clear throughout these proceedings that I had no intention of stipulating to anything.

The Court: I so understood.

Mr. Walters: As a matter of fact, when Mr. Westwood came to my office with the subpoena, there was a place for my name in the form of the stipulation, and I said at that time that I did not want my name or would not sign it as any form of stipulation or even agreement as to the form of proceedings. There is only one time to attack a subpoena, and that is at a time subsequent to its issue, in the form of a motion to quash. I thought I made it clear that I made no waiver. I just wanted to bring that into the record as a factual situation that should be considered.

Mr. Westwood: That is quite true. We had on the form of subpoena, as I took it to Mr. Walters' office, a line which would indicate, I think, no objection as to form. Mr.

[fol. 106] Walters did not want his name to appear lest it be misunderstood.

I don't want to take any unfair advantage or to be fostering any misapprehension in reading from a transcript as to what Mr. Walters said in open court. I thought that he did state his position on that particular issue.

The Court: Well, I would rule that there was no waiver by the defendant on the right to challenge the power of the Court, to compel the production of documents. Of course, I have just stated that the other moving parties had certainly not waived the right to challenge.

Mr. Westwood: I might add one word. I made two points regarding it. Not only the waiver as to power, which your Honor has said you would rule against me on that, but also a waiver as to the scope of the subpoena or question as to whether it was too broad. I say that the time to attack that was when we were before your Honor previously.

The Court: We will recess until 2 o'clock.

(Whereupon, the hearing in the above-styled matter recessed until 2 o'clock of the same day.)

[fol. 107] Afternoon Session

2:15 o'clock p.m.

Thereupon— The following proceedings were had:

The Court: No. 9425, Aristeguieta against Jimenez. Is the defendant present?

Mr. Walters: Yes, sir.

The Court: You may proceed.

Mr. Westwood: I was about to address myself, your Honor, at the recess to the basic questions of power. I would like to say just one word of background in that connection. It should be kept in mind that throughout our position is that the Federal Civil Rules do apply. Indeed, as your Honor doubtless recalls, by express provision in Rule 54 of the Criminal Rules, it is stated that they do not apply, the Criminal Rules do not apply to extradition. But even though—

The Court: I don't have them here before me. Is it said they do not apply or they do not govern?

Mr. Westwood: These rules are not applicable to extradition and rendition of fugitives. That's in Rule 54-D.

The Court: Well, my own view is that in a proceeding such as this, the Court is entitled to resort to any power or process it may have to compel the production of evi- [fol. 108] dence within the limits, of course, of privilege.

Mr. Westwood: Yes.

The Court: It doesn't matter what Rule or what Statute or what procedures it adopts. It can adopt any procedure, I take it, not in contravention of the particular statute governing these procedures or the Treaty, and exercising the power that it may have to compel the production of evidence. So I don't think we need to look to any particular set of rules if we can find it anywhere. It seems to me that the Court is duty bound to exercise it, and certainly may exercise it to compel the production of evidence for either side.

Mr. Westwood: Yes.

Well, your Honor, that eliminates a considerable amount that I might otherwise have said.

The Court: I thought it might save you some time. Of course, if that notion of mine is greatly shattered by any replies that may be made, you may wish to reply to it.

Mr. Westwood: Yes, your Honor, and I am prepared to deal somewhat thoroughly with that point.

I think, then, I need only say, in view of some of the suggestions in some of the moving papers, that as we see the matter, the Treaty contemplates quite plainly that some procedure such as was adopted in this instance is [fol. 109] appropriate, and I would particularly invite your Honor's attention to two provisions of Article 11 of the Treaty, one of which we referred to on November 23rd, which provides in the second sentence in the second paragraph of that Article provision that the judicial functionaries of each of the States shall prescribe the procedures to be followed, which as we see it is quite extensive power to the Court, the judicial agencies of the two Nations, to determine—

The Court: You are speaking of the contracting—

Mr. Westwood: Yes, your Honor, the Nations. And the last clause of the last sentence of Article 11 of the Treaty contemplates that there shall be introduced on behalf of, or that the demanding State or demanding Nation is privileged to introduce not only the warrant of arrest and the depositions or evidence which were taken by the demanding Nation in support of the warrant of arrest, but also specifically provides for the receipt of other evidence. So that it is very clear, as we see it, and under that last sentence in Article 11, it is, of course, contemplated that there may be presented on behalf of the demanding Nation evidence in addition to the evidence which it may have or which its agencies may have had before them at the time the warrant of arrest or request for extradition was determined upon.

I think I need not labor the point that, by the very nature of extradition, and oftentimes the need to act with [fol. 110] some speed in so far as the proceedings within the demanding Nation are concerned, it would be not unnatural that by the time the hearing is to be held in the Nation of asylum, there would be other evidence that would have become available or that would be secured which would be deemed by the demanding Nation to be relevant and appropriate in support of its demand; and as far as the Treaty or the Statutes thereunder contemplating the receipt of evidence secured in this country is concerned, there is no suggestion that I have been able to find anywhere that the demanding Nation is not privileged to seek evidence within the Nation of Asylum.

In fact, in one recent—

The Court: You wouldn't need to spend any time on that point, as far as I am concerned. My own tentative view is that no matter where the evidence is or when it arises, if it supports or gives support to a finding or is relevant to that issue, it would be proper to marshal it to wherever it could be marshaled.

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STATEMENT ON BEHALF OF THE THREE BANKS BY MR. HUMKEY

Mr. Humkey: If your Honor please, I appear in behalf of the three banks—the First National City Bank of New

York, the French-American Banking Corporation and the [fol. 111] Royal Bank of Canada.

The Court: You are Mr. Humkey?

Mr. Humkey: Yes, sir.

If I may at this time, I would like to have leave of the Court to file an affidavit by Mr. D. Noyer of the French-American Banking Corporation in support of the third ground of the motion being asserted by the bank. I will hand a copy of this to Mr. Westwood and Mr. Ward.

I would also like to have leave of the Court to file in behalf of the Royal Bank of Canada an affidavit of Mr. John C. Oram, O-r-a-m. I don't have an affidavit yet from the First National City Bank because I haven't been in the matter long enough to physically obtain it from New York yet, but as soon as we do, I would like leave of the Court to file that also and serve copies of that on opposing counsel.

Now, your Honor, about everything that I had to say to you this morning or this afternoon has already been said, I think. The three banks present three grounds in support of the motion to quash. The first is, of course, upon the ground that this is a matter Civil in nature and that the Civil Rules of Procedure would apply.

The Criminal Rules of Procedure are expressly excluded from application by their own terms, and that under our first ground we state that from Section 11 of the Treaty [fol. 112] nor from Section 3184 of Title 18, do we find that there is any provision which would empower the Court to issue a subpoena, the nature of which has been issued in this case, and since this is a proceeding Civil in nature, that 45 E-1 of the Civil Rules of Civil procedure relating to subpoenas which simply apply to exclude the obligation of these banks to respond here in Florida by way of producing the documents which have been sought by the subpoena duces tecum.

I think your Honor has covered that actually in the remarks that you had with Mr. Westwood, so I don't see any necessity for me going into any detail with reference to that.

Our third ground, of course, relates to the oppression and burdensomeness of the requirements of this subpoena,

and the affidavit which I have supplied I think adequately takes care of the reasons why we feel that that ground has some merit. So with that brief statement, I see no reason why I should consume more of the Court's time.

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COLLOQUY

Mr. Westwood: Your Honor, the matter of limitation as to amount, as your Honor has suggested, was a question which originally we certainly had very much in the [fol. 113] forefront of our minds as something that could be talked out.

The problem arises, of course, because the number of transactions might be enormously multiplied by some amount by trying to cover small amounts. I cannot be sure because, of course, I haven't been able to go into it with all of the banks. But from such inquiries that I have been able to make, it would indicate some amount such as $250 or $300 or $400—in that area—below which inquiry would not be made, and would very greatly simplify the matter and very considerably alleviate the burden.

We would be perfectly ready and indeed have had in mind all along that with the banks we would pick out some such amount, and if it were desirable to specify the amount here, we would suggest an amount of $250 with the understanding that we would in good faith seek to discuss with the banks in any particular case to increase that figure if it appeared that there was some problem that we don't anticipate which would not have been solved by fixing the figure at that amount.

Now, the second point—

The Court: $250?

Mr. Westwood: Yes.

The Court: How much is it charged that the defendant converted to his own use?

Mr. Westwood: There are millions. That is true.

[fol. 114] The Court: About how much in American money?

Mr. Westwood: Well, it would be, as far as the Complaint states, many millions of dollars. It is obvious that it does run into the many millions.

The Court: How many are "many"?

Mr. Westwood: I don't know, your Honor, just how many it would be, whether it would be ten or twelve or fifteen. I just can't tell at this point.

Of course, the problem that we have here is that of seeking to trace some very considerable number of transactions which, over a period of time, can be broken up into relatively small amounts.

The Court: Is it the theory of the plaintiff that these moneys were funneled out of the country in small amounts to various people, various of these people that are named?

Mr. Westwood: That's right. The people named in the subpoenas were closely associated with the defendant. The banks in this country were used in connection with the transactions in which they were engaged. Moneys were sent to those banks in various ways, sometimes directly and sometimes indirectly, via banks in other countries.

As I say, I've picked that figure indicated because I believe it very much simplifies the problem in terms of [fol. 115] number of transactions.

I made inquiry in one case with respect to the matter; and I don't want to testify or to hold those people to what they told me. But it is fair to say that it was indicated that a figure of that nature below which no inquiry will be made would very greatly simplify the matter and very considerably alleviate the mechanical burden of checking through microfilms and so on.

The Court: Does that apply both to deposits and withdrawals?

Mr. Westwood: Yes, sir; because the transactions would be both ways. Sometimes money would be coming in, and other times money would be going out. That would apply to both.

The Court: Is it your theory that this money was withdrawn from various places for the benefit of the defendant?

Mr. Westwood: Yes. Money would be withdrawn from one place and deposited to the account of the defendant in another, at another time and at another bank.

The Court: You expect to show by these bank records, I take it, that the source of these funds, geographically speaking, was Venezuela?

[fol. 116] Mr. Westwood: That's right. Of course, what is necessary in a matter of this kind is to indicate probable cause as to the existence of the kind of a pattern that is alleged in the Complaint. It is a difficult thing, and I am the first to agree. But in the case of crimes of this nature, if for the moment we may indulge in the presumption that a crime could have been committed, in the case of crimes of this nature, as the courts have recognized, they are not sharply recorded by those who commit them. But concealment through the various devices is, of course, a common thing and is one of the problems which the person who has the burden of proof has to cope with.

The Court: None of these conversions or malversations of funds are deemed by the Federal Court of Venezuela to be political crimes?

Mr. Westwood: No, your Honor. They are quite clear on that point.

The Court: The matter of time has also been referred to. You say this overlapping and bringing of the investigation up to date, within the allegations, covers a ten-year period from 1948 to 1958?

Mr. Westwood: Yes. That was a problem that puzzled me as to how to deal with it in this sense. Obviously steps were taken to conceal obvious evidence as to what was [fol. 117] done with the fruits of the crime after the occurrence of the crimes; and that is often quite relevant to the question of whether the crime was committed. Indeed, in many financial crimes of this general nature, there is considerable evidence as to what occurred after the occurrence of the crime with respect to the disposition of funds and so forth.

The Court: When is this defendant alleged to have come to this country?

Mr. Westwood: I don't know. There is an allegation as to when he came here. My recollection is—

Mr. Walters: I can furnish the Court with that information. He departed on January 23rd from Venezuela to the Dominican Republic and arrived here in March.

The Court: Of what year?

Mr. Walters: 1958.

Mr. Westwood: 1959. He left Venezuela in January, 1958 and arrived in this country in March, 1958.

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On October 21, 1959 and December 14, 1959 (Re-Filed) English Translation of Record of Extradition of General (R.) Marcos Perez Jimenez Was Filed, the Designated Portions of Which Are as Follows:

[fol. 118]

Request for Extradition

(Seal of the Federal Court)

The Republic of Venezuela

in its name

The Federal Court

Roger Hernandez R., Clerk of the Federal Court of the Republic of Venezuela, hereby certifies: that the documents contained herein are true copies of those contained in the record of proceedings resulting from the charges brought by the Attorney General against General Marcos Perez Jimenez (Ret.), former President of the Republic of Venezuela:

Whereas the Court, having considered the written charges, Annex No. 1 hereto, presented in the hearing of July 23, 1959, by the Attorney General against General Marcos Perez Jimenez (Ret.), former President of the Republic, determined, after studying the accompanying documents, by judicial decree dated on the 30th day of the same month and year, and after carrying out the summary proceeding provided for by Article 7 (section 16) of the Organic Law of the Federal Court, and article 362 of the Code of Criminal Procedure, that there is reason for the institution of a prosecution (Annex No. 2);

Whereas, as a result of the foregoing, the Court issued [fol. 119] on the 12th day of this month a warrant of arrest with due cause against the accused, General Marcos Perez Jimenez, based upon articles 407, 177, 181, 185, 415, 416 and 417 of the Penal Code, read together with article 84

of the same; articles 195, 196, 198, 199 and 205 of the same Code, and article 182 of the Code of Criminal Procedure (Annex No. 3);

Whereas, the accused, Marcos Perez Jimenez, is not within the country, and the Court has positive information and it is widely known that he is within the territory of the United States of America and has his residence in the City of Miami, State of Florida, of that country;

Therefore, the Federal Court, according to the provisions of articles 389 and 390 of the Code of Criminal Procedure, determines that the extradition of the accused, Marcos Perez Jimenez, should be requested from the Government of the United States of America and, for the purpose of furnishing all pertinent facts to the National Executive Authority, so that the necessary request may be made, deems it relevant to make the following preliminary statement:

A) *Facts on which the warrant of arrest is based.*

From the study made by the Court and from the particulars on which the warrant of arrest is based, issued on August 12, 1959, it appears:

[fol. 120] CRIMES AGAINST PERSONS

a) That between the accused, Perez Jimenez, and the officials of the defunct Seguridad Nacional, there was an agreement and connivance from which the participation of the accused is traced, as co-perpetrator of and accessory to the various criminal acts mentioned in the said warrant of arrest, and for which criminal proceedings are pending in the courts of the Republic. Accordingly, the said warrant of arrest states: Among the facts showing the close connection of the accused to the criminal acts specified below, the statements made by Mr. Segundo Hermogenes Espinoza should be mentioned, which appear on pages 77 and 78 et seq., from the record relating to the murder of Dr. Leonardo Ruiz Pineda, a certified copy of which is annexed to this record identified by the letter "L".

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b) It is stated in the warrant of arrest that, "based on this close connection, the record contains well founded and grave indications that the accused, who engineered everything in the Seguridad Nacional, participated in the crimes committed by it, especially in the commission of the murders of Drs. Leonardo Ruiz Pineda, German Gonzalez and Antonio Pinto Salinas, and of Mr. Luis Hurtado Higuera." [fol. 121] To that effect, the statements and proceedings relating to the murders of said citizens, by virtue of which the warrant of arrest was issued, are attached as Annex No. 6.

c) It is also stated in the warrant of arrest that "from the documents annexed by the Attorney General to his statement of charges, grave and well founded indications appear of the defendant's guilt, which identify him as a participant in the imprisonments, deportations, deprivations of liberty in concentration camps, kidnappings, tortures, defamations, forcible entries and personal injuries perpetrated by the said former functionaries of the defunct Seguridad Nacional, and carried out by them throughout the country"; these acts constituting common crimes contemplated by articles 177, 181, 185, 415, 416 and 417 of the Penal Code, read together with article 84 of the same.

Concerning these facts, a certified copy of the judgment of the First Superior Penal Court of the Jurisdiction of the Federal District and the State of Miranda, dated December 22, 1958, is attached hereto as Annex No. 7, wherein appear statements and proceedings regarding the said crimes.

Crimes Against Property

It is stated in the warrant of arrest that, on March 14, 1949, before the First Civil Court of First Instance of the [fol. 122] Federal District, the accused, Perez Jimenez, declared, as the property of himself and of his wife, Flor Chalbaud de Perez Jimenez, assets with a total value of one hundred and thirteen thousand bolivares (Bs. 113,000.00) (Annex No. 8), later increased by one million two hundred and eighty-three thousand two hundred and thirty-two bolivares and 15 centimos (Bs. 1,283,232.15), received

by him as salaries drawn for official duties performed from November 25, 1948 to January 22, 1958, without estimating deductions for living expenses (Annex No. 9); and later increased, according to the particulars contained in the record, as appears below:

a) By forty million, three hundred and forty thousand, five hundred and ninety-four bolivares and 72 centimos (Bs. 40,340,594.72), equivalent to the amount of twelve million, forty one thousand, nine hundred sixty-eight dollars and 57 cents ($12,041,968.57), a sum which was deposited in various amounts in bank accounts which the accused kept in foreign countries, as is proven by the various vouchers contained in the record as Annex No. 10.

b) It is shown in the warrant of arrest that "there also appears in the assets of the accused the amount of seventeen million, two hundred and eighty one thousand bolivares (Bs. 17,281,000.00), consisting of securities and equities in corporations, which were impounded by the Attorney Gen- [fol. 123] eral, as set forth in the proceedings of the Civil Court of First Instance of this jurisdiction, the 39 pages of which are included in the record as Annex 'C'." The proceedings referred to are contained in this record as Annex No. 11.

With reference to the said assets, the warrant of arrest indicates that they were found in a valise that the accused left behind at his residence, El Paraiso, in this city, the night he fled the country, January 23, 1958. Concerning this valise, it should be noted that the following cable appears in the record as Annex No. 12: "VZ DR 330/HE 212 CIUDAD-TRUJILLO RD 24 23 1850 LIEUT. VINICIO PLAZA, AVENIDA EL EJERCITO CALLE SANABRIA QUINTA LOURDES EL PARAISO CARACAS. DESIRE REPORT ON VALISE REPLY TO THIS CITY FLOR DE PEREZ JIMENEZ". There also appears in the record a letter from the accused, Perez Jimenez, as Annex No. 13, reading as follows: "Marcos Perez Jimenez, Miami Beach, October 24, 1958. Mr. Diogenes Peña, Consul General of Venezuela, Miami, Florida. Mr. Consul: I am writing to advise, through your good offices, whomever it may concern in Venezuela, regarding a matter of my personal interest.

When I left the country early in the morning of January 23rd of this year, a valise was left behind containing negotiable valuables and various papers. I made this fact known in due course to the members of the Government Junta. As I have learned that part of these negotiable valuables [fol. 124] are not included in the list of my impounded properties, I wish to place the matter on record. The valuables I refer to are the following: About three million bolivares (Bs. 3,000,000) in bonds of the Centro Simon Bolivar (the list of these bonds was also in the said valise); about one hundred thousand dollars in bills ($100,000.00) and about three hundred thousand bolivares (Bs. 300,000) in bills of five hundred, one hundred, fifty, twenty and ten bolivares. I wish to make this statement because so long as these valuables are not returned to their legitimate owner, who is the writer, they should remain in the possession of the Venezuelan nation and not in the hands of third persons, which would simply and plainly be an act punishable by the normal laws of any country. I shall be thankful for the attention you may give this letter. (Signed) Marcos Perez Jimenez."

c) It is stated in the warrant of arrest that, "similarly, it appears in the record that the accused is the owner, personally and through intermediaries declared as such by the Attorney General under authority vested in him by Decree No. 28 of February 6, 1958 issued by the Government Junta of the Republic of Venezuela, of numerous personal properties and real estate, specified in the report for the years 1957-58 submitted by the Attorney General to the National Congress, of which a copy is contained in the record iden- [fol. 125] tified by the letter 'B'." Among these properties appear:

1. Three houses and three lots, in the name of the accused, which form a single property and constituted his residence and that of his family located in El Paraiso in this city;

2. Four lots of more than twenty eight thousand square meters (M2. 28,000) located in the developments of Santa Monica, Los Chaguaramos, and Colinas de Bello Monte, in this city, on which buildings were constructed especially

for the presidential residence and its guard; this real estate is in the name of the wife of the accused, Flor Chalbaud de Perez Jimenez;

3. Eight parcels of land, also in the name of the said wife, with an area of eight thousand four hundred and forty two square meters and 15 square centimeters (M2. 8,442.15) located in the Playa Grande development, Maiquetia Parish, Vargas Department, Federal District;

4. Nine parcels of land of more than fifteen thousand square meters (M2. 15,000) located in the Caraballeda development, also in the Vargas Department, Federal District, which are in the name of the wife of the accused;

5. Twelve lots of one hundred and six thousand three hundred and twelve square meters (M2. 106,312), in the name of the same woman, located at El Peñon, Baruta [fol. 126] Township, Sucre District, State of Miranda, which form a single fully developed property, with special buildings for the eventual residence of the accused and his family;

6. A parcel of land of forty-two thousand two hundred and fifty square meters (M2. 42,250), located at the place called "Lagunetica", within the Guaicaipuro District of the said State of Miranda, which also stands in the name of the wife of the accused;

7. There also appears among the assets of the accused the "La Francia" building, of ten stories, and its land, located on Las Monjas corner in this city of Caracas; which real estate stands in the name of Fortunato Herrera, who was legally declared an intermediary of the accused;

8. Likewise, there appears as a property of the defendant, standing in the name of the company called "Polinversiones, C.A.", similarly declared an intermediary of the accused, the land known as "Carbonero", consisting of more than three thousand five hundred hectares (Hect. 3,500), located within Veroes Township, San Felipe District, State of Yaracuy, purchased for four hundred thousand bolivares (Bs. 400,000.00). With regard to this property, there appears in the Attorney General's report, identified as "D-1",

a photostatic copy of the document executed by Fortunato Herrera, in his capacity as Managing Director of "Polin- [fol. 127] versiones, C.A.", in which he states that this purchase was made "for the exclusive benefit of General Marcos Perez Jimenez, because it was by him and the seller that all the essential elements of the transaction were satisfied, pertaining to this property." A like statement made by the same company, appears regarding the rural properties known as "Chuao" and "Cepe", located within the Mariño District, State of Aragua, as per document also in the record;

9. The Paris Building of ten stories, located between the Alcabala and La Cruz corners in this city, which also stands in the name of said company, "Polinversiones, C.A.", likewise appears as the property of the accused.

10. Among the properties of the accused there is also "La Majada" ranch with its furnishings and livestock, which also stands in the name of the said Fortunato Herrera.

In addition to the properties described above, there are many other personal properties, stocks, real estate, estates and ranches located in the Federal District and various states of the Republic, all owned by the accused, as specified in the list in Annex "K", set forth on pages 123 to 132 of the report submitted to the National Congress by the Attorney General. There is attached to the present record, as Annex No. 14, a certified copy of the said list.

d) The record also contains statements in the hand of [fol. 128] the accused, Perez Jimenez, verified by handwriting experts, which were contained in the charges of the Attorney General, identified with the letter "E", that the accused had in his private safe the following amounts of money on the dates indicated: On 7-16-51, Bs. 2,000,509.75; on 9-12-51, Bs. 2,565,209.75; on 10-29-51, Bs. 1,847,509.75; on 12-30-51, Bs. 2,902,589.25; on 1-21-52, Bs. 2,612,589.25. Data relating to these amounts are contained in Annex No. 15.

e) It likewise appears in the record that through the said "Edificio Washington C.A.", the accused and General

(R.) Luis Felipe Llovera Paez deposited in the Banco Union in this city in December, 1957, the sum of Six Million Bolivares (Bs. 6,000,000), which was intended for the purchase of stock in the Colonial Trust Company of New York, this amount being subsequently withdrawn from the said bank on January 9, 1958, as indicated in the data contained in this record as Annex No. 16.

f) It also appears in the warrant of arrest that the accused, abusing his position as a public official, obtained for himself, from various persons, sums of money as percentages or commissions from the purchase of armaments, tanks, ships, airplanes and other material purchased as the property of the Venezuelan nation, as shown in writings, photostatic copies of which are annexed as Annex "F" to the charges preferred by the Attorney General, which are [fol. 129] attached to this record as Annex 17.

With reference to these commissions, collected by the accused to the injury of the public treasury, special mention should be made of those shown by the following matter, which is part of the statements referred to in the annex last cited above:

1. Commission collected by "Polinversiones, C.A.", a company which was declared an intermediary of the accused, Perez Jimenez:

"D-7. COVELSA. Caracas, August 23, 1955.

"AGREEMENT

"Between: Doctor Timoleonte Gozzi L., holder of Identity Card No. 558224, Managing Director of COVELSA (Compania Venezolana de Electrificacion S.A.), Dr. Romero Bavera, holder of Identity Card No. 132289, Administrator-Manager of C.I.T.I.M., both duly authorized by their respective Boards of Directors and their principals:

"1) COVELSA for G.I.E. (Gruppo Industrie Electro-Meccaniche per Impianti all' Estero), Milan, Italy.

"2) C.I.T.I.M. for ANSALDO SAN GIORGIO, of Genoa, Italy, and the corporation, Polinversiones, C.A., have entered into the following contract: The representatives of said com-

panies, Doctor Timoleonte Gozzi L., and Doctor Romero Bavera, agree to a commission of TEN PER CENT (10%) to [fol. 130] Polinversiones, C.A., of the amount of the bid submitted on August 15th of this year to the Ministry of Development, for the supply of materials and equipment for the Hydro-Electric plant of Caroni-Macagua No. 1, for which bidding was invited on May 10, 1955. This ten per cent (10%) is understood to depend on what we have submitted to the Ministry of Development being selected. The specified commission of ten per cent (10%) will be paid in toto to Polinversiones, C.A. at the time when the Ministry of Development awards the contract to COVELSA, the bidding company.

"The Company Polinversiones, C.A., on its part, declares that from the specified commission of 10% there will also be paid in the same transaction, to COVELSA and C.I.T.I.M. jointly, the sum of one hundred thousand bolivares (Bs. 100,000) as fees for their services. (Sgd.) Doctor Timoleonte Gozzi L., Managing Director of COVELSA. (Sgd.) Doctor Romero Bavera, Administrator-Manager of C.I.T.I.M.—NOTE. Payment of the commission of ten per cent (10%) will be made by COVELSA exclusively and directly to Polinversiones, C.A."

2. Commissions specified in handwritten records of the accused, among which those received by him from transactions between the Nation and various companies are conspicuous, specified in the said Annex:

[fol. 131]

"TANKS	$ 601,800	258.774	you
		180.540	me
		120.360	successor
		42.126	Pulido
"ANSALDO	$1,567,500	785.000	you
		482.500	me
		300.000	successor

"BOATS	$ 340,359	170.175	you
		102.105	me
		68.070	successor
"VISCOUNT	$ 317,121	190.272	you
		126.848	me

"The transportation was settled and paid last February 25th: Bs. 260,879.05, equivalent to $78,500.00."

B) *Justification for Extradition under International Law.*

1. The United States of America and Venezuela have concluded, ratified and exchanged the Treaty of Extradition which was signed in Caracas on January 19, 1922 and which is in force.

2. The contracting governments agreed, according to Article I of the said Treaty "to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been con- [fol. 132] victed of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II" * of the said Convention.

3. The crimes referred to in Article II of said Treaty and which constitute cause for extradition applicable in the present case are the following:

* * * * * * *

* The translation of these quotations has been copied from the English version of the Treaty text appearing in 43 Stat. 1698 et seq.

[fol. 169]

REPUBLIC OF VENEZUELA

FEDERAL COURT

CARACAS

ANNEX NUMBER TEN

(No. 10)

[fol. 170] MONEY SENT ABROAD BY GENERAL (R) MARCOS PEREZ JIMENEZ, MR. FORTUNATO HERRERA AND "POLINVERSIONES, C.A.", ACCORDING TO DATA COMPILED TO 6-15-58 BY THE OFFICE OF THE ATTORNEY GENERAL.

Gen. (R) Marcos Perez Jimenez

2- 5-51	Deposited by Dr. Napoleon Dupouy to the checking account of Gen. Marcos Perez Jimenez in the National City Bank of New York, in New York	$	150,000.00	Bs.	502,500.00
2-28-51	Deposited by Dr. Napoleon Dupouy to the checking account of Gen. Marcos Perez Jimenez in the National City Bank of New York, in New York	$	430.73	"	1,442.95
10-11-51	Deposited by Dr. Napoleon Dupouy to the checking account of Gen. Marcos Perez Jimenez in the National City Bank of New York, in New York	$	100,000.00	"	335,000.00
12- 3-51	Deposited by Dr. Napoleon Dupouy to the checking account of Gen. Marcos Perez Jimenez in the National City Bank of New York, in New York	$	100,000.00	"	335,000.00

2-21-52	His deposits to this date with the First National City Bank of New York, in New York	$ 350,430.73	Bs.	1,173,942.95
[fol. 171]				
7-10-53	Remitted to the First National City Bank of New York, in New York	$ 1,000,000.00	Bs.	3,350,000.00
2-15-54	Remitted to the First National City Bank of New York, in New York	$ 1,000,000.00	"	3,350,000.00
12- 7-54	Deposited by Dr. Napoleon Dupouy to the checking account of Gen. Marcos Perez Jimenez in the American Banking Corporation in New York ..	$ 1,000,000.00	"	3,350,000.00
3-18-57	Remitted to the First National City Bank of New York, in New York	$ 300,000.00	"	1,005,000.00
3-22-57	Check No. 120180 drawn by Dr. Pedro A. Gutierrez Alfaro against Bank of London $(sic) South American, deposited to the checking account of the same Dr. Gutierrez Alfaro and/or Lola T. de Gutierrez in the First National City Bank of New York, in New York and transferred to Gen. Marcos Perez Jimenez	$ 300,000.00	"	1,005,000.00
3-27-57	Remitted to the First National City Bank of New York, in New York	$ 300,000.00	"	1,005,000.00

10- 1-57	Deposited by Dr. Silvio Gutierrez to the checking account of Gen. Marcos Perez Jimenez in the Union Bank of Switzerland, in Zurich, by check drawn against the Chemical Corn Exchange Bank of New York	$ 1,000,000.00	Bs.	3,350,000.00
[fol. 172]				
11-27-57	Deposited by Dr. Pedro A. Gutierrez Alfaro to the checking account of Gen. Marcos Perez Jimenez in the Hibernia Bank in New Orleans, for conversion to dollars	$ 447,761.19	"	1,500,000.00
	Sub-total: remitted abroad by Gen. (R) Marcos Perez Jimenez	$ 6,018,622.65	Bs.	20,262,885.90

Remittances of money made by the aforesaid citizen, on the dates and in the amounts specified, through The Royal Bank of Canada, in Caracas, to be deposited to his checking account in the New York Branch.

10- 9-53	$	27,703.68
10-24-53		26,809.95
10-30-53		23,830.85
11- 4-53		59,580.29
11- 6-53		29,791.16
11-17-53		29,791.16
12- 4-53		29,791.16
12-14-53		29,791.16
12-28-53		14,895.58
1-26-54		29,791.16

[fol. 173]

2-25-54		$	14,895.58		
3-17-54			14,895.58		
4-30-54			44,686.74		
5-12-54			44,686.56		
7- 8-54			29,791.16		
7-27-54			14,895.58		
9- 4-54			22,343.37		
10- 7-54			25,322.49		
11-10-54			44,686.74		
11-30-54			14,895.58		
12-15-54			14,895.58		
1- 8-55			29,791.16		
1-18-57			136,417.90		
1-10-58			298,507.46	Bs.	3,525,883.56
8-30-57	His deposits in checking account in the New York Branch of the Royal Bank of Canada, to this date ..	$	891,692.52	Bs.	2,987,169.94
9-30-57	His deposits in checking account in the First National City Bank of New York, in New York, to this date		581,821.40	"	1,949,101.69
	Sub-total: Remitted abroad by Mr. Fortunato Herrera		2,526,001.55	"	8,462,105.19

[fol. 174]

Polinversiones, C.A.

4-11/ 5-16-57	National Bonds and their respective interest coupons, endorsed by Fortunato Herrera, Director General of "Polinversiones, C.A.", to the order of The Royal Bank of Canada, in Caracas, to be sent to its New York Branch and returned before maturity to the Caracas Branch, collected by the latter and the proceeds remitted to the New York Branch ..	$ 2,403,629.26	Bs.	8,052,158.01
10- 7-57	Amount remitted to this date to the New York Branch of The Royal Bank of Canada	1,063,715.11	"	3,563,445.62
	Sub-total: Remitted abroad by Polinversiones, C.A.	3,467,344.37	"	11,615,603.63
	OVERALL TOTAL:	12,041,968.57	"	40,340,594.72

Note: According to records in the handwriting of the former President himself, he had the following amounts of cash on the dates indicated:

1) As of 7-16-51	Bs.	2,000,509.75
2) As of 9-12-51	"	2,565,209.75
3) As of 10-29-51	"	1,847,509.75
4) As of 12-30-51	"	2,902,589.25
5) As of 2-21-52	"	2,612,589.25

[fol. 175]

DEPOSITED WITH
THE NATIONAL CITY BANK OF NEW YORK
FOR CREDIT TO THE ACCOUNT OF

Marcos Perez Jimenez
(Please Print Full Title)

ADDRESS Venezuela

DATE Feb. 5 1951

	DOLLARS	CENTS
BILLS		
COIN		
CHECKS WHERE PAYABLE (LIST SEPARATELY)	$150,000	—
duplicate (illeg.) deposited by Napoleon Dupouy (Initials illeg.)		
TOTAL	$150,000	—

(SEAL)

[fol. 176]

DEPOSITED WITH
THE NATIONAL CITY BANK OF NEW YORK
FOR CREDIT TO THE ACCOUNT OF

Marcos Perez Jimenez
(Please Print Full Title)

ADDRESS Venezuela

DATE 10/11 1951

	DOLLARS	CENTS
BILLS		
COIN		
CHECKS WHERE PAYABLE (LIST SEPARATELY)	$100,000	—

duplicate
deposited by Napoleon Dupouy
(Initials illeg.)

(SEAL)

TOTAL:	$100,000	—

[fol. 177]

DEPOSITED WITH
THE NATIONAL CITY BANK OF NEW YORK
FOR CREDIT TO THE ACCOUNT OF

Marcos Perez Jimenez
(Please Print Full Title)

ADDRESS Venezuela

DATE Dec. 3 1951

	DOLLARS	CENTS
BILLS		
COIN		
CHECKS WHERE PAYABLE (LIST SEPARATELY)	40,000	—
	28,000	—
	32,000	—

—10—

duplicate
deposited by

Napoleon Dupouy

(SEAL)

TOTAL	100,000	—

[fol. 178]

DEPOSITED WITH
THE NATIONAL CITY BANK OF NEW YORK
FOR CREDIT TO THE ACCOUNT OF

Marcos Perez Jimenez

(Please Print Full Title)

ADDRESS Caracas, Ven.

DATE 2/15 1952

	DOLLARS	CENTS
BILLS		
COIN		
CHECKS WHERE PAYABLE (LIST SEPARATELY)	$1,000,000	—
		—11—
		(SEAL)
TOTAL	$1,000,000	—

[fol. 179]

(SEAL)

THE NATIONAL CITY BANK OF NEW YORK
ESTABLISHED 1812

Trust Affiliate
City Bank Farmers Trust Company

VIA AIR MAIL 55 Wall Street, New York 15, N. Y.

Cable Address "CITIBANK" July 10, 1953

FB 1

Mr. Marcos Perez Jimenez
Caracas
Venezuela

Dear Mr. Jimenez:

Pursuant to your request of July 7, 1953, we hereby certify that the balance in your Demand Account carried at our Head Office, Overseas Division, 55 Wall Street, New York City, close of business July 10, 1953, was $1,350,430.73.

Very truly yours,

(signature illegible)

Assistant Cashier

(COURT SEAL)

[fol. 180]

THE NATIONAL CITY BANK OF NEW YORK
ESTABLISHED 1812

Trust Affiliate
City Bank Farmers Trust Company
55 Wall Street, New York 15, N. Y.

VIA AIR MAIL

Cable Address "CITIBANK"

October 27, 1954

Mr. Marcos Perez Jimenez
Caracas, Venezuela

Dear Mr. Perez Jimenez:

Pursuant to your request of October 20, 1954, we hereby certify that the balance in your Demand Account carried at our Head Office, Overseas Division, 55 Wall Street, New York City, close of business October 26, 1954 was $2,090,785.73.

Very truly yours,

/s/ J. E. Wheeler

J. E. Wheeler
Assistant Vice President

(COURT SEAL)

[fol. 181]

In Account With
THE FIRST NATIONAL CITY BANK OF NEW YORK
55 Wall Street, New York 15, N. Y.

R. MARCOS PEREZ JIMENEZ

—14—

VENEZUELA (COURT SEAL)

DESCRIPTION	DEBIT	CREDIT	DATE			BALANCE
BALANCE BROUGHT FORWARD			52'	FEB	21	350,430.73
		1000,000.00	53'	JUL	10	1,350,430.73•
		1000,000.00	54'	FEB	15	2,350,430.73•
	259,645.00		54'	SEP	8	2,090,785.73•
	1102,105.00		56'	MAY	14	988,680.73•
		300,000.00	57'	MAR	18	1,288,680.73•
		300,000.00	57'	MAR	27	1,588,680.73•

LAST AMOUNT ABOVE IS
YOUR FINAL BALANCE

[fol. 182]

FRENCH AMERICAN BANKING CORPORATION

—15—

31 NASSAU STREET

NEW YORK 5, N.Y.

CREDIT ADVICE

(COURT SEAL) DATE 12/7/54

WE CREDIT your account with the following under usual reserve:

	VALUE	AMOUNT
REMITTANCE RECEIVED FROM		
DR. NAPOLEON DUPOUY		$1,000,000.00

MAIL TO

MARCOS PEREZ JIMENEZ
C/O AUDITING DEPARTMENT
F.A.B.C. NEW YORK

VERY TRULY YOURS,
FRENCH AMERICAN BANKING CORPORATION

(Signature illegible.)

On items credited without usual reserve, as well as on all others, the FABC declines responsibility as to the genuineness of prior endorsements and maintains the right of full recourse in case of irregularities in the same.

[fol. 183]

—16—

FRENCH AMERICAN BANKING CORPORATION

31 NASSAU STREET

NEW YORK 5, N. Y.

Cable Address:
FRENAMBANK

December 7, 1954

Sr. Marcos Perez Jimenez,
c/o Auditing Department
French American Banking Corporation,
New York

Dear Sir:

We acknowledge receipt of your letter of December 1st 1954 and take pleasure in enclosing herewith our credit advice in the amount of $1,000,000.—received for your account from Mr. Napoleon Dupouy.

In accordance with your instructions, we have today credited the account of Banco Provincial de Venezuela, Caracas, on our books, with $1,000,000.—as a time deposit maturing December 7, 1955 and bearing interest at 6% per annum. Our advice relative thereto is enclosed.

We will credit your account monthly with the interest charged by us to Banco Provincial de Venezuela.

Good note has been taken of your other instructions.

Very truly yours,

(Signature illegible.)

President

(COURT SEAL)

JD/JTM
encls.

[fol. 184]

—32—

(COURT SEAL) (SEAL)

March 22, 1957

The First National City Bank of New York
55 Wall Street
New York, New York

Dear Sirs:

You are hereby authorized to charge the account of Pedro A. Gutierrez Alfaro and/or Lola T. de Gutierrez Alfaro in the amount of $300,000 (Three Hundred Thousand Dollars) and credit a like amount to the account of General Marcos Perez Jimenez once you have received for the credit of the aforementioned joint account the sum of $300,000. This amount is being remitted to you by means of a draft on the Bank of London and South America.

Very truly yours,

/s/ Pedro A. Gutierrez Alfaro
Pedro A. Gutierrez Alfaro

(Notation illegible.)

[fol. 185]

(COURT SEAL)

THE NATIONAL CITY BANK OF NEW YORK

ADVICE OF CREDIT

55 WALL STREET
NEW YORK 15, N. Y.
FOREIGN TELLERS

No. RM 538987

2/6/51

—40—

TO MR. MARCOS PEREZ JIMENEZ,
CARACAS, VENEZUELA

WE HAVE CREDITED YOUR ACCOUNT $150,000.00
VALUE

2/5

DEPOSITED BY

NAPOLEON DUPOUY

THE NATIONAL CITY BANK OF NEW YORK

(Signature illegible)

[fol. 186]

(COURT SEAL)

THE NATIONAL CITY BANK OF NEW YORK

ADVICE OF CREDIT

55 WALL STREET
NEW YORK 15, N. Y.
FOREIGN TELLERS

No. RM. 548082 2/28/51

—41—

TO MARCOS PEREZ JIMENEZ VEN
HOLD ALL MAIL

WE HAVE CREDITED YOUR ACCOUNT $430.73
VALUE

2/28

DEPOSITED BY

NAPOLEON DUPOUY

THE NATIONAL CITY BANK OF NEW YORK

(Signature illegible)

[fol. 187]

—50—

(COURT SEAL)

Receipt

We hereby certify having received from
His Excellency Silvio GUTIERREZ, Caracas,
US$ 1'000'000.—per check drawn on the Chemical Corn Exchange Bank, New York, order Swiss Bank Corporation, Zurich,

for collection and credit to the account of His Excellency President Marcos Perez Jimenez.

Zurich, 1st October, 1957.

UNION BANK OF SWITZERLAND

(Signature illegible)

[fol. 188]

—51—

(Translation of a Handwritten Note)

Today, June 24, 1952, I turned over to Dr. Napoleon Dupouy the amount of Bs 119,000.00

[fol. 189]

THE HIBERNIA NATIONAL BANK
IN NEW ORLEANS

—53—

November 27, 195..

WALLACE M. DAVIS
PRESIDENT

Excellency:

I take pleasure in advising you that Dr. Pedro A. Gutierrez Alfaro has deposited with us to your credit the sum of one million five hundred thousand bolivares.

Because of the difficulty of converting this sum into dollars without influencing the exchange rate on bolivares, which would, in our opinion, be bad for Venezuela as well as decreasing the amount of dollars available from this sum of bolivares for you, and after full discussion with Dr. Gutierrez, we have advised that this sum will be converted into dollars and deposited to your account over a period of several weeks. In this manner, the exchange rate will not be adversely influenced and you will be able to derive the greatest benefit from the sum which you have so graciously entrusted to us.

As of the moment, we are able to guarantee the figure of 29.57. If we cannot improve this conversion figure, all of your money will be converted and deposited to your account at this figure. If it is at all possible to do so, we will certainly exert every effort to work in your interest to improve this exchange.

[fol. 190] Appreciating the confidence you have expressed in us by establishing your account with us, and assuring you that we will do everything we can to assist in executing your desires, we are,

Respectfully yours,

/s/ Wallace M. Davis
Wallace M. Davis,
President.

(COURT SEAL)

His Excellency Marcos Perez Jimenez,
Caracas, Venezuela.

[fol. 191]

(COURT SEAL)

THE NATIONAL CITY BANK OF NEW YORK

—58—

ADVICE OF CREDIT
No. RM. 656690

55 WALL STREET
NEW YORK 15, N. Y.
FOREIGN TELLERS

10/11/51

TO MARCOS PEREZ JIMENEZ VEN

WE HAVE CREDITED YOUR ACCOUNT $100,000.00
VALUE

10/11

DEPOSITED BY

NAPOLEON DUPOUY

THE NATIONAL CITY BANK OF NEW YORK

(Signature illegible)

DW

[fol. 192]

(COURT SEAL)

—17—

FRENCH AMERICAN BANKING CORPORATION
ORIGINAL
DEBIT ADVICE

To: MARCO PEREZ JIMENEZ
c/o AUDITING DEPT.
F.A.B.C.

New York 12/8/54

WE DEBIT your account the following:

	Value	Amount
	12/7/54	
AMOUNT PAID TO BANCO PROVINCIAL DE VENEZUELA, CARACAS, PURSUANT TO YOUR LETTER OF 12/1/54.		$1,000,000.—

Respectfully,

FRENCH AMERICAN BANKING CORPORATION

[fol. 220]

REPUBLIC OF VENEZUELA

FEDERAL COURT

CARACAS

ANNEX NUMBER FIFTEEN

(No. 15)

[fol. 221] REPUBLIC OF VENEZUELA

OFFICE OF THE ATTORNEY GENERAL

No. .....

ANNEX "E"

Testimony of handwriting experts concerning handwritten statements of commissions paid to General (R) Marcos Perez Jimenez and of the amounts of money held by him in his private safe.

[fol. 222] Caracas, June 30, 1959

To the Attorney General

Office of the Attorney General

The undersigned, Victor Mileo, handwriting expert assigned by the technical section of the Judiciary Police Force to conduct an examination of the items specified below, submits the following report under oath, for the appropriate legal purposes.

EXPERT TESTIMONY

PURPOSE:

The examination in question was to be made for the purpose of establishing the identity of the characteristics of the handwriting in the signature "M. PEREZ JIMENEZ", appearing on a sheet of paper marked with number 21 in red pencil, and that of the signature "N. DUPOUY", appearing on checks Nos. 243 and 257, for the amounts of $17,002.25 and $16,492.53 respectively, both checks drawn on the "National City Bank of New York", marked in red pencil with the numbers 2 and 3; and also the same signature on a receipt for the amount of Bs. 2,000,000.00, marked in red with the number "7". The examination was also to be made to establish the identity between the handwriting appearing

[fol. 223] on the two checks mentioned above, and that of the sheets of paper marked with red numbers 4, 5, 6, 18, 19, 21, 22, 51, and 60, which carry a seal reading "Republic of Venezuela—First Judicial District—Second Civil Court of First Instance". For the purpose of comparison, the following signatures have been submitted, which are considered unquestionable: General (R) MARCOS PEREZ JIMENEZ, signature on Certificate of Taking Possession of Office as Provisional President of the Republic, dated December 3, 1952, and marked in red pencil with the number 67. Signature appearing on a document covering purchase of a lot of land from Mrs. Josefina Zuloaga de Tovar, which was executed by the Subordinate Office of the First Circuit of the Registry of the Libertador Department of the Federal District on October 10, 1950, and registered under number 14, page 22 of Registry No. 1, Volume 13. Dr. NAPOLEON DUPOUY, signature appearing on a declaration made before the Attorney General dated February 26, 1958, which consists of five pages, marked in blue pencil with the numbers 1,754, 1,755, 1,756, and 1,758.

EXPLANATION:

A detailed and scrupulous examination was made of the handwritten characters appearing in the items specified above. By means of instruments and appropriate tech-[fol. 224] nical procedure, a meticulous comparison was made of the characteristics of both the signatures submitted as unquestionable and the signatures and writing in the other items included in the study. It has been possible to establish by comparison of handwriting, that the signature "M. PEREZ JIMENEZ", appearing on the sheet of paper marked "21" in red pencil, presents all the characteristics observed in the signatures submitted as unquestionable. These characteristics coincide in the peculiar shape of the letters, pressure, interruption of continuity, expansion of the writing, speed of the graphic stroke, and the slant and average height of the letters. These two latter characteristics were proved by means of curves projected on graphs of the signatures compared, measured in tenths of millimeters, which curves show up as almost identical on

the graph drawn for the purpose. The same procedure was applied to the signatures "N. DUPOUY" submitted as unquestionable, and those appearing on the aforesaid checks and the receipt for Bs. 2,000,000.00 mentioned above. It has been possible to establish that these signatures present identical characteristics. The characteristics of the handwriting in the other items cited above were also subjected to a scrupulous and detailed examination. To the best of my knowledge and belief, and according to observations made during the meticulous tests to which items in question were subjected, I have reached the following conclusion:

[fol. 225] CONCLUSION:

1. The signature "M. PEREZ JIMENEZ" appearing on the sheet of paper marked "21" in red pencil was written by the same person who wrote the signatures submitted as unquestionable. This same person wrote the material appearing on sheets marked with the numbers 6, 18, 19, 20, 21, 22, 51, and part of number 60.

2. The signature "N. DUPOUY" on the checks marked with numbers 2 and 3 in red pencil, and the receipt for Bs. 2,000,000.00 marked in red with number 7, were written by the same person who wrote the signature submitted as unquestionable. The handwriting appearing on sheets of paper marked in red pencil with the numbers 4, 5, part of 60 and all its reverse side, was done by the same person who wrote on the aforesaid checks the number, date, and the amounts in letters and figures.

The documents submitted for the purpose of the present study are herewith returned.

The Expert

/s/ Victor Mileo
Victor Mileo

[fol. 226]

REPUBLIC OF VENEZUELA

MINISTRY OF JUSTICE

TECHNICAL SECTION OF THE JUDICIARY POLICE FORCE

VM/jn — Caracas, July 14, 1959

7-1-59 — 150 and 151

The undersigned certifies: that MR. VICTOR MILEO, who signs the present document, is an official of the Technical Section of the Judiciary Police Force.

The Director

/s/ Dr. Rodolfo Plaza Marquez

Dr. Rodolfo Plaza Marquez

[fol. 227]

(Translation of handwritten document)

No. 1 —18—

N.C.B.	$150,000 (APPROXIMATELY)	
DUPUY (sic)	91,495.45	
PETER	150,000	
	IN BOLIVARES	1,311,509.75
SMALL SAFE		
BILLS of Bs. 500		402,000
" " " 100		162,000
LARGE SAFE		
BILLS of Bs. 500		25,000
" " " 100		100,000
	TOTAL	2,000,509.75

Caracas, July 16, 1951

[fol. 228]

(Translation of handwritten document)

No. 2 —19—

In addition to the foregoing

N.C.B. $100,000 (one hundred thousand dollars)

LARGE SAFE

In bills of Bs. 500.00 and Bs. 100.00

Bs. 229,700.00 (two hundred twenty-nine thousand, seven hundred bolivares)

Caracas, Sept. 12, 1951

[fol. 229]

(Translation of handwritten document)

No. 3 —20—

In the National City Bank of New York	$250,000
In checks of Dr. Napoleon Dupouy	91,495.45
In checks of Mr. Pedro A. Peters	150,000
In checks of Mr. Vigil C. Applewhite	60,000
Total dollars	551,495.45
In the small safe	Bs. 564,000
In the large safe	" 354,000
Total bolivares	918,000

Caracas, October 29, 1951

[fol. 230]

(Translation of handwritten document)

No. 4 —21—

a) In the National City Bank of New York	$350,000.00
b) In checks of Mr. Pedro A. Peters	150,000.00
c) In American bills (large safe)	51,500.00
d) In bills in the large safe	Bs. 354,000.00
e) In bills in the small safe	" 564,000.00
f) Dr. Napoleon Dupouy owes me for various items $134,691.46, of which I owe $38,718.71 Balance	$95,972.75

Caracas, December 30, 1951

(signature almost illegible, apparently "M. Perez Jimenez".)

Bs. 2,902,589.25

[fol. 231]

(Translation of handwritten document)

No. 5 —22—

Withdrawn from the small safe Bs. 290,000.00 in bills for the purchase of bonds of the Avenida Bolivar (Corporation). Napoleon Dupuy (sic) received these bolivares and will deliver the bonds.

Caracas, February 21, 1952.

[fol. 232]

(Translation of handwritten document)

—6—

I delivered to Dr. Napoleon Dupuy (sic) in checks $151,495.45 to deposit in the N.C.B. $100,000.00 and to bring me in bills $51,495.45.

Caracas, November 28, 1951.

I gave (money) to—(partially illegible) so he could sell me 19 shares in "La Criolla" Brewery.

Caracas, November 28, 1951.

• • • • • • •

[fol. 233]

REPUBLIC OF VENEZUELA
FEDERAL COURT
CARACAS

ANNEX NUMBER SIXTEEN
(No. 16)

[fol. 234]

BANCO UNION
Incorporated Capital: Bs. 50,000,000
Caracas, Venezuela

FOR Bs. 3,000,000.00.—

We have received from Edificio Washington, C.A. the sum of THREE MILLION BOLIVARES (Bs. 3,000,-000.00), as a deposit, to be used in its entirety for the acquisition of shares in the Colonial Trust Company, of New York, at their cost price as per settlement to be made in the course of next month, January.

Caracas, December 30, 1957

/s/ Ramon Aller Alberdi
Director-General

/s/ Francisco Zacarias Hernandez
Vice President-Secretary

[fol. 235]

Caracas, January 9, 1958

Edificio Washington, C.A.

City

Dear Sirs:

By means of this letter I am notifying you *that, in accordance with instructions of General Marcos Perez Jimenez* and my personal decision we have decided not to carry out the negotiations for the acquisition of shares in the Colonial Trust Co. of New York, to which the instructions given by me to the above concern, in a letter dated December 26, 1957, refer.

I would appreciate your returning to me, as soon as possible, the sum of SIX MILLION BOLIVARES (Bs. 6,000,000.00—) which was to be used for the transactions which this communication cancels.

Attentively,

/s/ Luis Felipe Llovera Paez
Luis Felipe Llovera Paez

[fol. 236]

Edificio Washington
Componia Anonima
Esquina de la Torre
Caracas - Venezuela

Caracas, January 9, 1958

Banco Union
Present

Dear Sirs:

By means of this letter we are revoking the order communicated to you dated December 30 of last year, to purchase shares in the Colonial Trust Company of New York, for which purpose the sum of SIX MILLION bolivares (BS 6,000,000.00), in two parts of THREE MILLION each

was deposited to our order in your Institution, on December 30, 1957.

Rather, we request you to send us a check for the equivalent in Dollars of the aforementioned sum of SIX MILLION Bolivares, debiting the special account opened December 30 of last year.

With our grateful thanks, we remain,

Very truly yours,

by the ADMINISTRATIVE COUNCIL

(Signature illegible)
President

[fol. 237]

Edificio Washington
Componia Anonima
Esquina de la Torre
Caracas, Venezuela

For US$1,791,044.78

We have received from the BANCO UNION corporation (Union Bank) of this City, the sum of ONE MILLION SEVEN HUNDRED NINETY ONE THOUSAND FORTY-FOUR Dollars and 78 cents, in a bank check drawn on the Chase Manhattan Bank and duly endorsed, this sum being equivalent to the sum of SIX MILLION Bolivares which was deposited to our order in the said Institution, on December 30, 1957, in two parts of three million Bolivares each, for the purpose of investment in the purchase of shares in the Colonial Trust Company of New York.

Caracas, January 9, 1958

By the ADMINISTRATIVE COUNCIL

(Signature illegible)
President

[fol. 238] For BS 6,000,000.—

I have received from the C.A. Edificio Washington the sum of SIX MILLION BOLIVARES (BS 6,000,000.—), which amount was to be used for the acquisition of shares of the Colonial Trust Company of New York, according to the instructions given to that Corporation in my letter dated 26 December 1957, which were revoked in my letter dated the 9th inst.—

Caracas, January 14, 1958

(Signed)
Luis Felipe Llovera Paez

[fol. 239] Record of the deposition made before the Attorney General, by Dr. Cesar Gonzalez Gomez, Engineer, of this domicile, about the legal status of the Washington Building, Inc.

In Caracas, the seventeenth day of the month of April, nineteen hundred fifty-eight, at 4 PM, by request of the Attorney General, Doctor Cesar Gonzalez Gomez appeared in his office, and under oath disclosed the following in relation to the aforementioned Edificio Washington, C.A.

Q. Please state whether you are a personal friend of Generals Luis Felipe Llovera Paez and Marcos Perez Jimenez?

A. I am a person friend of General Luis Felipe Llovera Paez, and I have only a slight acquaintance with General Perez.

Q. Please state whether you are the person who originally appears as holding title in the acquisition of the old Washington Building located on Esquina de la Torre in the City of Caracas, and of another adjoining property located between Torre and Veroes?

A. Yes, it is true, and I acquired the Washington Building in the following manner: I paid the sum of Bs. 1,500,000 on account for this building, which monies came

from the following sources: Bs. 500,000 of my own and [fol. 240] Bs. 1,000,000 which General Luis Felipe Llovera Paez paid to me, *advising me that of this sum, Bs. 500,000 belonged to General Marcos Perez Jimenez* and Bs. 500,000 was his own. My friend, General Luis Felipe Llovera Paez, knowing that I was a construction engineer interested in that sort of work, indicated to me that it seemed to him advantageous for me to contribute part of the capital also, with the object of ensuring for myself the engineering work that was to be performed there, since a large building was going to be constructed there later. More than as a capitalist investing in this project, I was interested in it to obtain the contract for the corresponding work.

With respect to the other property, that which belonged to Delfin Curiel, I was granted an option, and at that time the option was granted I paid Bs. 100,000.00 which was returned to me later as I shall soon explain.

I left then, to go abroad, where I remained for two months. Upon my return I spoke with General Luis Felipe Llovera Paez about what he was thinking of doing about this affair. General Luis Felipe Llovera Paez informed me that he and his partner could not at the moment bear the total costs of the transaction, that is the payment of the balance on the Washington Building and the payment for the Curiel house, which together added up to Bs. 7,800,000.00. That they were thinking further of forming [fol. 241] a corporation with negotiable shares among a group of friends, and that I might reach an agreement with Dr. Juan Carmona and Dr. Jose Joaquin Gonzalez Gorrondona who were organizing the group and the prospective company. I contacted them. Dr. Carmona drew up the articles of the company and formed it in the following manner: Dr. Cesar Gonzalez Gomez, that is the deponent, Bs. 2,500,000.00; Dr. J. J. Gonzalez Gorrondona, Bs. 2,000,000; Comercial Prosperi, *C.A.*, Bs. 2,500,000; Dr. Juan Carmona, Bs. 1,000,000.00; Salvador Salvatierra S., Bs. 1,000,000 and Dr. Arturo Camacho C., Bs. 1,000,000.00.

The formation was completed in May of 1957. Two or three months later, I am certain that General Luis Felipe Llovera Paez bought shares to the value of Bs. 5,000,000 from the following persons: From me, 100 shares with a

value of Bs. 1,000,000.00; from Dr. Jose Joaquin Gonzalez Gorrondona, 160 shares with a value of Bs. 1,600,000.00; from Mr. Salvador Salvatierra, 80 shares with a value of Bs. 800,000.00; from Mr. Arturo Camacho, 80 shares with a value of Bs. 800,000.00, and from Dr. Juan Carmona, 80 shares with a value of Bs. 800,000.00. I am a shareholder of the Company in the amount of one million five hundred thousand Bolivares (Bs. 1,500,000.00) in three negotiable certificates Nos. 5, 6 and 7 of 50 shares each. I am able to demonstrate that I am really the owner of these shares, by [fol. 242] having had sufficient resources to purchase them, as shown in my declaration to this effect before the Treasury Department, upon the occasion of this investment in negotiable certificates. So, the ten million Bolivares (Bs. 10,000,000.00) of the company are distributed thus: General Luis Felipe Llovera Paez Bs. 5,000,000.00; *Comercial Prosperi, C.A.*, Bs. 2,500,000.00; and the Carmona Group, made up of Dr. Juan Carmona, Dr. Jose Joaquin Gonzalez Gorrondona, Mr. Salvador Salvatierra and Mr. Arturo Camacho, Bs. 1,000,000.00. The certificates were delivered to their owners, thus: A single certificate for Bs. 5,000,000.00 to General Luis Felipe Llovera Paez; the three certificates of my shares already mentioned; 2 certificates of Bs. 1,000,000.00 and one certificate of Bs. 500,000.00 to the Comercial Prosperi, two certificates of Bs. 200,000.00 to Dr. Jose Joaquin Gonzalez Gorrondona; one certificate of Bs. 200,000.00 to Mr. Salvador Salvatierra, and one certificate of Bs. 200,000.00 to Mr. Arturo Camacho.

Q. Please state, Doctor, whether General Llovera Paez ever told you who was the partner he always used to mention?

A. *General Marcos Perez Jimenez.* I imagine that the shares of General Llovera Paez, or that is *the Bs. 5,000,000.00, belonged one-half to him and one-half to General Marcos Perez Jimenez,* considering the great friendship [fol. 243] which existed between them, and considering also the circumstance that the first Bs. 1,000,000.00 contributed for the transaction was Bs. 500,000 from General Llovera Paez and Bs. 500,000 from General Perez.

Q. Please state whether besides the Bs. 10,000,000.00 mentioned, the Company of which you are President received

other amounts from Generals Luis Felipe Llovera Paez and Marcos Perez Jimenez?

A. Dr. Juan Carmona informed me that there had been deposited in a "Special Account" of the Edificio Washington, C.A., in the Banco Union, the amount of six million Bolivares in two lots of three million Bolivares each, belonging to Generals Marcos Perez Jimenez and Luis Felipe Llovera Paez, to be invested in shares of the Colonial Trust Company of New York. Those amounts were deposited on December 30, 1957. In the first days of January, 1958, after the military events in Maracay, Dr. Juan Carmona himself informed me that the aforementioned Generals had abandoned the purchase of the shares referred to, and since the amount in question was deposited in the name of the Edificio Washington, C.A., of which I am president, *I was asked to direct the bank to deliver this amount to Generals Perez Jimenez* and Llovera Paez, as was done; General Llovera Paez having received, in his name and *in the name of General Perez Jimenez*, a check in dollars equivalent to [fol. 244] Bs. 6,000,000.00, although the receipt was presented for the amount in Bolivares, (Bs. 6,000,000.00). I have the original receipt and I promise to send you a photostatic copy. Outside of these sums, the company has not received any other amount.

Q. Please state how the Bs. 10,000,000, which form the capital of the Edificio Washington, C.A. have been invested?

A. In the purchase of the real estate referred to, the sum of approximately Bs. 9,300,000.00, the rest in registration expenses, formation of the Company, commissions, wrecking of buildings, plans and blueprints for the building.

Q. Do you believe that the Comercial Prosperi, C.A. is the legitimate owner of the shares which appear in its name?

A. I believe so. I have known Raffali for many years. I believe he has money and therefore I believe that the Comercial Prosperi company which he represents is the legitimate owner of the shares. It is also true that Raffali is a very good friend of General Llovera Paez.

Q. Do you think that the other persons appearing as shareholders are the legitimate owners of their shares?

A. I have no reason to think the contrary. I cannot be sure, since all are well-known capitalists.

And, having nothing further to declare and not having [fol. 245] been interrogated further by the Attorney General, the present deposition is concluded.

(Signed)
Dr. Cesar Gonzalez Gomez

(Signed)
Dr. Pablo Ruggeri Parra
Attorney General

• • • • • • •

[fol. 246]

REPUBLIC OF VENEZUELA

FEDERAL COURT

CARACAS

ANNEX NUMBER SEVENTEEN

(No. 17)

[fol. 247] "1"

N. DUPOUY
Edificio San Bernardino
Avendia Panteon
San Bernardino
CARACAS, VENEZUELA

—2—

VEN NAPOLEON DUPOUY

July 9th, 1952 1.8
No. 257 210

Pay to the
order of $16,492.53
sixteen thousand four hundred ninety two 53/100 DOLLARS

To
THE NATIONAL CITY BANK OF NEW YORK
Overseas Division 55 Wall Street
New York, U.S.A.

/s/ N. DUPOUY

—3—

VEN NAPOLEON DUPOUY

No. 243 January 30th, 1952 1.8
210

Pay to the
order of $17,002.25
seventeen thousand two 25/100 ———— DOLLARS

To
THE NATIONAL CITY BANK OF NEW YORK
Overseas Division 55 Wall Street
New York, U.S.A.

/s/ N. DUPOUY

[fol. 248]

(Translation of a handwritten document)

—4—

Deposit in New York	$100,000
in bolivares (Bs. 229,700)	68,979
	$168,979

3rd destroyer: £ 2,660,000

5% = 133,000 × 28 = $372,400

2/5 = $148,960

The difference (168,979 — 148,960) or $20,019, was applicable to F. N.

To this effect there remained pending:

5,902
19,136.25
11,983

37,021.25

Subtracting the $20.019 already paid, there remains a balance of $17,002.25 (37,021.25 — 20,019), that is delivered in check No. 243, thus paying off F. N.

1/30/52

[fol. 249]

(Translation of a handwritten document)

"TANKS	$ 601,800	258,774	you
		180,540	me
		120,360	successor
		42,126	Pulido
"ANSALDO	$1,567,500	785,000	you
		482,500	me
		300,000	successor
"BOATS	$ 340,359	170,175	you
		102,105	me
		68,070	successor
"VISCOUNT	$ 317,121	190,272	you
		126,848	me

"The transportation was settled and paid last February 25th: Bs. 260,879.05, equivalent to $78,500.00."

[fol. 250]

(Translation of a handwritten document)

—6—

I delivered to Dr. Napoleon Dupuy (sic) in checks $151,495.45 to deposit in the N.C.B. $100,000.00 and to bring me in bills $51,495.45.

Caracas, November 28, 1951.

I gave (money) to—(partially illegible) so he could sell me 19 shares in "La Criolla" Brewery.

Caracas, November 28, 1951.

[fol. 251]

(Translation of a handwritten document)

Contract of 6-30-50

Total: 5% on $1,701,000 = $85,050.

Delivered:

August 31, 1950: 5,700 - 5,700 - 5,700 - 7,173.23 = 24,273.23

November 22, 1950: 5,000 - 5,000 - 8251.73 = 18,251.73

$42,524.96

Pending execution: 42,525.04

Contract of 12-15-50

Total: 6½% on $511,000 = $33,215.

Divided up as follows:

3½% = 17,885

1% = 5,110

1% = 5,110

1% = 5,110

No delivery has been made.

Settled and to be delivered: 33% or:

5,902

1,686.30

1,686.30

1,686.30 10,960.90

[fol. 252]

(Translation of a handwritten document)

—60—

General resume:

to be delivered: 10,960.90

pending execution of the respective contracts.

Contract 6-30-50	42,525	
" 12-15-50	22,254	
	$64,779	

Personal resume:

to be delivered:	5,902.00
pending execution:	
Contract 6-30-50	19,136.25
" 12-15-50	11,983.
Bofors	58,951.50
	$95,972.75

in bolivares:

Compania Bernard: Bs. 125,000.00 (This sum was already paid). The remainder is pending plus a sum not determined from Bernard.

• • • • • • •

[fol. 253]

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT FOR EXTRADITION—Filed September 11, 1959

Comes now Manuel Aristeguieta, the plaintiff herein and the Consul General of the Republic of Venezuela for the States of Florida, Georgia, and South Carolina, duly appointed and acknowledged by the Government of the Republic of Venezuela and duly recognized by the Government of the United States of America, and amends his complaint for extradition herein to allege as follows:

1. The plaintiff is located in and has his office in Miami, Florida.

2. The defendant is Marcos Perez Jimenez, a citizen of the Republic of Venezuela, over forty years of age, now to be found in Miami Beach, Florida, within the territorial jurisdiction of this Court.

3. This Court has jurisdiction of this cause by virtue of 18 U.S. Code 3184 and the Treaty of Extradition of January 19, 1922, between the Governments of the Republic of Venezuela and of the United States of America proclaimed January 2, 1924, appearing in 43 Stat. 1698, and [fol. 254] now in full force and effect.

4. The defendant has been duly charged by appropriate proceeding in the Republic of Venezuela with having committed, while he was actually within Venezuela, certain common crimes, specifically referred to hereinafter.

5. The complaint herein was made on instructions to the plaintiff from the Charge d'Affaires, a. i., of the Republic of Venezuela in Washington, D. C. This amended complaint is made on instructions to the plaintiff from the Ambassador of the Republic of Venezuela in Washington, D. C.

6. On August 23, 1959, the Charge d'Affaires, a. i., of the Republic of Venezuela in Washington, D. C., presented a note to the Secretary of State of the United States re-

questing the provisional arrest and detention, with a view to extradition, of the defendant. On the same date, Mr. R. R. Rubottom, Assistant Secretary of State for Latin American Affairs, on behalf of the Secretary of State, replied to that note, stating that, after the defendant's "provisional arrest and detention upon complaint made by a diplomatic or consular officer of Venezuela and the procedure provided in Section 3184 of Title 18 of the United States Code, the Department of State will be pleased to consider a formal request for extradition." A copy of the note on behalf of the Secretary of State is attached hereto as Exhibit A.

[fol. 255] 7. On August 24, 1959, the Embassy of the Republic of Venezuela in Washington, D. C., received from the Government of the Republic of Venezuela the extradition documents in this matter. They include, among other things, an order of arrest of the defendant, issued by the Federal Court of Venezuela at Caracas on August 12, 1959, on the basis of the defendant's alleged committing of certain common crimes, including those specifically referred to hereinafter, and a ruling by such Court in such order that there is reasonable cause to believe that the defendant is guilty of such crimes. Such ruling recites that it was based on the evidence appearing in the record before such Court. A copy of such order and ruling is attached hereto as Exhibit B. An accurate English translation thereof is attached hereto as Exhibit C, together with the affidavit of the translator as Exhibit D.

8. Thereafter, the complaint herein was made by the plaintiff on August 24, 1959.

9. On August 25, 1959, the aforesaid Charge d'Affaires delivered a note to the Secretary of State of the United States requesting the extradition of the defendant and transmitting the extradition documents. A copy of an accurate English translation of this note is attached hereto as Exhibit E. On the same date, Col. John M. Raymond, Deputy Legal Adviser to the Secretary of State, on behalf of the Secretary of State, replied to such note, acknowledg-
[fol. 256] ing the formal request for extradition and re-

turning the extradition papers "in order that they may be presented by a diplomatic or consular officer of Venezuela to an appropriate judge or commissioner in the United States in connection with" the hearing provided in 18 U.S. Code 3184. A copy of this reply is attached hereto as Exhibit F.

10. The aforesaid extradition documents are now in the possession of the Embassy of the Republic of Venezuela in Washington, D. C. They consist of some three hundred pages, in Spanish. Qualified translators are now at work on an English translation thereof but, because of their volume and technical character, such translation will not be completed for a considerable period of time. These documents will be filed with this Court upon completion of the translation and within the period of two months after the defendant's arrest as contemplated by Article XII of the Treaty of Extradition.

11. Such extradition documents contain the record of the following proceeding under the law of the Republic of Venezuela:

Charges were filed against the defendant by the Attorney General of the Republic of Venezuela in the Federal Court of such Republic at Caracas, with voluminous supporting documentary evidence.

[fol. 257] After consideration of such charges and evidence, such Court decreed on July 30, 1959, that sufficient cause had been established for the trial of the defendant on the charges.

Thereupon the order and ruling referred to in paragraph 7 of this amended complaint were issued on August 12, 1959.

Such Court, on August 13, 1959, determined that the National Executive of the Republic of Venezuela should request the extradition of the defendant from the United States of America on the basis of charges of crimes within Article II, sections 1, 2, 14 and 21 of the aforesaid Treaty of Extradition; that justification for such extradition under such Treaty had been established as a matter of fact and of law; and that, upon extradition, the defendant would be tried only for the offenses for which his extradition

is requested and in no case for offenses of a political character. A copy of such determination is attached hereto as Exhibit G. An accurate English translation thereof is attached hereto as Exhibit H, together with the affidavit of the translator as Exhibit I.

The extradition documents are duly authenticated as required by law, including the authentication of the Ambassador of the United States of America in Caracas, Venezuela, being the authentication prescribed by 18 U.S. Code 3190. A copy of the authentications is attached hereto as Exhibit J.

[fol. 258] 12. Of the charges of common crimes thus made against the defendant those for which his extradition is sought from the United States of America are specified in Exhibit B (the translation of which appears in Exhibit C) and in Exhibit G (the translation of which appears in Exhibit H) and may be summarized as follows:

A. The defendant, while in Venezuela, in violation of law ordered the unlawful murders of Dr. Leonardo Ruiz Pineda, of Dr. German Gonzalez, of Dr. Antonio Pinto Salinas, and of Mr. Luis Hurtado, by persons purporting to act as officials of an agency known as the Seguridad Nacional whose conduct in fact was fully controlled and determined by the defendant.

The murder of Dr. Leonardo Ruiz Pineda occurred on the night of October 21, 1952, in Caracas, Venezuela, on Avenida Principal de San Agustin del Sur by shooting with revolvers fired by various agents of the Seguridad Nacional, among whom were Daniel Colmenares (alias Suelespuma), Jose Luis Arias, and Francisco Ramon Matute.

The murder of Dr. German Gonzales occurred on the night of October 22, 1952, carried out in the headquarters of the Seguridad Nacional in Caracas.

The murder of Dr. Antonio Pinto Salinas occurred in the early morning of June 11, 1953, in the township of [fol. 259] San Juan de los Morros, Roscio District, State of Guarico, Venezuela, on the Los Llanos Highway at a point known as Cueva de Tigre by shooting with a rifle

and a machine gun fired by Braulio Barreto Pacheco and Isidoro Marrero Mendez, agents of the Seguridad Nacional.

As to the murder of Mr. Luis Hurtado this amended complaint will be amended later to provide particulars after completion of the translation of the extradition documents.

Such murders were common crimes in violation of Article 407 of the Penal Code of the Republic of Venezuela, which provides:

> "Whoever has voluntarily inflicted death on any person shall be punished with imprisonment for twelve to eighteen years."

The defendant was an accessory thereto within the meaning of Article 84 of such Penal Code, which provides:

> "The penalty corresponding to the applicable crime, reduced by one-half, shall be suffered by any person who has participated therein in any of the following ways:
>
> 1. Inciting or abetting the decision to commit the crime or giving a promise of aid and assistance after its commission.
>
> [fol. 260] 2. Giving instructions or supplying means for its commission.
>
> 3. Facilitating the performance of the act or aiding and abetting its performance, either before or during its performance.
>
> The reduction of the penalty provided in this article shall be inapplicable, in any of the cases herein specified, to persons without whose participation the act would not have been committed."

B. (1) The defendant was one of three members of the Government Junta of the Republic of Venezuela from November 24, 1948, until December 2, 1952. Such Junta was the supreme power in the Republic during such period. Then from December 2, 1952, until January 23, 1958, he

was the Chief Executive of the Republic. As a member of the Junta he, jointly with the other two members thereof, and as Chief Executive he alone was charged with the management of the public funds of the Republic and did in fact manage and control such funds. While he was in Venezuela, during such period from time to time and in violation of law he misappropriated to his personal use and benefit many millions of bolivares (equivalent to many millions of United States dollars), the exact amount and [fol. 261] the exact times of each such misappropriation being presently unknown to the plaintiff.

(2) Likewise, while the defendant was in Venezuela, during such period from time to time and in violation of law, he exacted so-called commissions and promises of commissions, paid or to be paid either to him or to persons on his behalf, for his personal use and benefit, amounting to many millions of bolivares (equivalent to many millions of United States dollars), the exact amount and the exact times of each such payment of commissions or promise being presently unknown to the plaintiff. Such payments and promises were made by persons selling to, or interested in the sale to, the Government of the Republic of Venezuela of arms, tanks, launches, airplanes and other articles, and were made in connection with such sales and were required by the defendant to secure his consent to such sales.

Included among the aforesaid exactions is a contract by two Italian companies, Covelsa and C.I.T.I.M., entered into in Caracas on August 23, 1955, whereby Covelsa promised to pay to a Venezuelan company, Polinversiones C.A., ten per cent of Covelsa's bid to furnish materials and supplies for construction of a hydro-electric plant in Venezuela if its bid were accepted by the Venezuelan Government. The bid was accepted. Polinversiones C.A. was bene- [fol. 262] ficially owned by the defendant through which he received such commission, for his personal use and benefit, demanded by him as a condition to the award of such Government contract.

Such misappropriations and such exactions of commissions and of promises were in violation of the following provisions of the Penal Code of the Republic of Venezuela:

Article 195:

"Every public official who embezzles funds or other personal property, the collection, custody or management of which has been entrusted to him by virtue of his office, shall be punished with imprisonment for three to ten years.

"If the loss is not heavy, or if complete reparation is made before the guilty party is brought to trial, he shall suffer imprisonment for three to twenty-one months."

Article 196:

"Every official who by abuse of his office forces a person to give or to promise to him or to any third party any sum of money or other illicit profit or gift shall be punished with imprisonment for eighteen months to five years.

[fol. 263] "If the amount or thing illicitly given or promised is of little value, the period of imprisonment shall be for three to twenty-one months."

Article 198:

"Every official who, for the performance of any official duty, receives for his own or another's account, a remuneration, whether in the form of money or any other thing which is not due him, or accepts any offer of such remuneration, shall be punished with imprisonment for one to two months."

Article 199:

"Every public official who receives or exacts a promise of money or other benefit, either directly or through another person, for delaying or omitting any official duty, or for doing an act which is contrary to that duty, shall be punished with imprisonment for a period of three to five years. The term of imprisonment shall be for a period of four to eight years if the offense has resulted in:

[fol. 264] 1. The grant of public employment, subsidies, pensions or honors, or the award of contracts in which the agency employing the official has an interest.

2. Tending to cause any loss or injury to any of the parties to a civil action or to a party found guilty in a criminal proceeding.

"If the act has resulted in a conviction carrying a restriction of personal liberty in excess of six months, the term of imprisonment shall be three to ten years."

Article 205:

"Every public official who directly, or through an intermediary or by deceit, obtains for himself any personal benefit in any act of public administration in which he performs a function shall be punished with imprisonment for six months to five years."

13. Attached hereto as Exhibit K are provisions of the Venezuela Penal Code involved in the proceedings before the Federal Court, as included in the extradition documents. Relevant quotations from these provisions are set forth in paragraph 12 of this amended complaint. An accurate English translation of Exhibit K is attached hereto [fol. 265] as Exhibit L, together with the affidavit of the translator as Exhibit M.

14. Based upon the preceding paragraphs of this amended complaint, the plaintiff charges the defendant with having committed, within the jurisdiction of the Republic of Venezuela and while the defendant was physically present within such jurisdiction, the crimes specified in paragraph 12 of this amended complaint.

15. The offenses thus charged against the defendant are crimes within Article II, sections 1, 2, 14 and 21 of the aforesaid Treaty of Extradition. The defendant is not exempt from prosecution or punishment therefor, from lapse of time or other lawful cause, under the laws of the Republic of Venezuela.

Wherefore, the plaintiff prays that this Court shall not terminate the arrest of the defendant, heretofore effected on the complaint herein and the warrant issued pursuant thereto, and that the defendant be brought in due course before this Court, or a commissioner hereof, for a hearing and consideration of evidence of the defendant's criminality as provided in 18 U.S. Code 3184; and the plaintiff further prays that, after such hearing, a certification as provided in 18 U.S. Code 3184 be issued to the Secretary of State of the United States of America in order that the surrender of the defendant may be effected upon requisition of the proper authorities of the Republic of Venezuela; [fol. 266] and the plaintiff further prays for such other or different relief as may be just and proper in the premises.

Manuel Aristeguieta, Consul General of the Republic of Venezuela.

William G. Ward, Ward & Ward, 1240 Dupont Building, Miami, Florida: Howard C. Westwood, Covington & Burling, Union Trust Building, Washington 5, D. C., Attorneys for Plaintiff.

City of Miami,
County of Dade,
Southern District of Florida,
Miami Division, ss.:

Before me, the undersigned United States District Judge personally appeared, this 11th day of September 1959, Manuel Aristeguieta, Consul General of the Republic of Venezuela, located at Miami, Florida, who, upon being [fol. 267] duly sworn, upon oath states that, upon information and belief, the allegations contained in the aforesaid amended complaint are true; and that such information and belief on his part are based upon (a) his personal examination of the extradition documents in the case of Marcos Perez Jimenez forwarded to the Embassy of the Republic of Venezuela in Washington, D. C., by the Government of the Republic of Venezuela, all of which he has

personally read, supplemented by consultation with his attorneys and with the Ambassador of the Republic of Venezuela in Washington, D. C., who is a member of the bar of the Republic of Venezuela and until recently was in active practice of law in such Republic, (b) the affidavits of translators copies of which are attached to the amended complaint as Exhibit D and as Exhibit I and as Exhibit M, and (c) copies of notes between the Charge d'Affaires, a. i., of the Republic of Venezuela in Washington, D. C., and the Department of State of the Government of the United States of America, and information relating thereto, duly transmitted to him by such Charge d'Affaires.

Wm. C. Mathes, United States District Judge.

[fol. 268]

IN UNITED STATES DISTRICT COURT

AMENDMENT NO. I TO AMENDED COMPLAINT FOR EXTRADITION—Filed November 23, 1959

Comes now Manuel Aristeguieta, the plaintiff herein and the Consul General of the Republic of Venezuela for the States of Florida, Georgia, and South Carolina, duly appointed and acknowledged by the Government of the Republic of Venezuela and duly recognized by the Government of the United States of America, and amends paragraph 12 of his amended complaint for extradition herein to allege as follows:

12. Of the charges of common crimes thus made against the defendant those for which his extradition is sought from the United States of America are specified in Exhibit B (the translation of which appears in Exhibit C) and in Exhibit G (the translation of which appears in Exhibit H) and may be summarized as follows:

A. (1) The defendant, while in Venezuela, in violation of law confederated, schemed, connived and agreed with persons connected with an organization known as the Seguridad Nacional to effect the murders of certain per-
[fol. 269] sons in Venezuela. In the course of and in pur-

suance of such scheme, Dr. Leonardo Ruiz Pineda, Dr. German Gonzales, Dr. Antonio Pinto Salinas and Mr. Luis Hurtado Higuera were murdered by persons purporting to act as agents of the aforesaid Seguridad Nacional.

(2) The defendant, while in Venezuela, in violation of law ordered the unlawful murders of Dr. Leonardo Ruiz Pineda, of Dr. German Gonzales, of Dr. Antonio Pinto Salinas, and of Mr. Luis Hurtado Higuera, by persons purporting to act as agents of the Seguridad Nacional, whose conduct in fact was controlled and determined by the defendant.

The murder of Dr. Leonardo Ruiz Pineda occurred on the night of October 21, 1952, in Caracas, Venezuela, on Avenida Principal de San Agustin del Sur, by shots from revolvers fired by various agents of the Seguridad Nacional, among whom were Daniel Colmenares (alias Sueles-puma), Jose Luis Arias, and Francisco Ramon Matute.

The murder of Dr. German Gonzales occurred on the night of October 22, 1952, in the headquarters of the Seguridad Nacional in Caracas.

The murder of Dr. Antonio Pinto Salinas occurred in the early morning of June 11, 1953, in the township of San Juan de los Morros, Moscio District, State of Guarico, Venezuela, on the Los Llanos Highway at a point known [fol. 270] as Cueva de Tigre by shots from a rifle and a machine gun fired by Braulio Barreto Pacheco and Isidoro Marrero Mendez, agents of the Seguridad Nacional.

The murder of Mr. Luis Hurtado Higuera occurred in Venezuela.

Such murders were common crimes in violation of Article 407 of the Penal Code of the Republic of Venezuela, which provides:

> "Whoever has voluntarily inflicted death on any person shall be punished with imprisonment for twelve to eighteen years."

If not a principal in such murders, the defendant was an accessory thereto within the meaning of Article 84 of the Penal Code of the Republic of Venezuela, which provides:

"The penalty corresponding to the applicable crime, reduced by one-half, shall be suffered by any person who has participated therein in any of the following ways:

1. Inciting or abetting the decision to commit the crime or giving a promise of aid and assistance after its commission.

2. Giving instructions or supplying means for its commission.

[fol. 271] 3. Facilitating the performance of the act or aiding and abetting its performance, either before or during its performance.

The reduction of the penalty provided in this article shall be inapplicable, in any of the cases herein specified, to persons without whose participation the act would not have been committed."

B. The defendant was one of three members of the Government Junta of the Republic of Venezuela from November 24, 1948, until December 2, 1952. Such Junta was the supreme power in the Republic during such period. From December 2, 1952, until January 23, 1958, defendant was the Chief Executive of the Republic. As a member of the Junta, he, jointly with the other two members thereof, and as Chief Executive he alone was entrusted with administration of the public funds of the Republic, and he did in fact administer and control such funds. As a member of the Junta, defendant, jointly with other members of the Junta, and as Chief Executive he alone had responsibility for administering the public affairs of the Republic, including the awarding of contracts for supplies and materials and for public works. During such period defendant by himself and in concert with others engaged in [fol. 272] a series of acts which had as an objective his and their illicit enrichment at the expense of the public.

(1) During such period, from time to time and in violation of law, defendant, while in Venezuela, abstracted and misappropriated funds with the administration and custody of which he had been entrusted, in the amount of many

millions of bolivares (equivalent to many millions of United States dollars), and converted them to his personal use and benefit and the use and benefit of others. Specific means and devices whereby the defendant abstracted and misappropriated funds with the administration and custody of which he had been entrusted by virtue of his office included:

(a) the conversion to his own use and benefit and the use and bene[illegible] of others of funds in the public treasury;

(b) the diversion to himself through intermediaries and to others of funds in the public treasury;

(c) causing improvements to be made and work to be done on his private property and in connection with his private ventures at public expense, in some cases by public employees using tools and machinery the property of the public;

(d) causing grants and loans of public funds to be made to enterprises in which he had an interest;

(e) the receipt by him and by others on his behalf and [fol. 273] otherwise and the conversion to his and their use and benefit of so-called commissions and other rewards and benefits in connection with the negotiation and award of contracts for the purchase with public funds of arms, tanks, launches, airplanes and other articles or property supplied or to be supplied to the Republic of Venezuela;

(f) the payment to himself and to others on his behalf and otherwise of public funds for the purchase of real and personal property at inflated values by the Republic of Venezuela and in connection with other transactions with the Republic of Venezuela from which he and others on his behalf and otherwise unlawfully benefited.

(2) (a) During such period, from time to time and in violation of law, the defendant, while in Venezuela, corruptly discharged the functions of his office by receiving commissions and other benefits and rewards and promises of such commissions and other benefits and rewards not due to him, paid or to be paid to him or to other persons

on his behalf, for his personal use and benefit, amounting to many millions of bolivares (equivalent to many millions of United States dollars).

(b) During such period, from time to time and in violation of law, the defendant, while in Venezuela, corruptly discharged the functions of his office by exacting so-called [fol. 274] commissions and other benefits and rewards and promises of such commissions and other benefits and rewards not due to him, paid or to be paid to him or other persons on his behalf, for his personal use and benefit, amounting to many millions of bolivares (equivalent to many millions of United States dollars).

Such payments and promises, exacted or received by the defendant in the corrupt discharge of his office, were made by persons selling to, or interested in the sale to, the Government of the Republic of Venezuela of arms, tanks, launches, airplanes and other articles or property and were made in connection with such sales.

(3) (a) During such period, from time to time and in violation of law, the defendant, while in Venezuela, corruptly discharged the functions of his office by causing, directly and through persons acting on his behalf, improvements to be made and work to be done on his private property and in connection with his private ventures at public expense, in some cases by public employees using tools and machinery the property of the public.

(b) During such period, from time to time and in violation of law, the defendant, while in Venezuela, corruptly discharging the functions of his office, obtained for himself, directly and through persons acting on his [fol. 275] behalf, benefits from acts of public administration in which he performed functions directly or by reason of his general responsibility for the affairs of the Republic by

(i) the sale to the Republic at inflated values of property which the defendant owned or in which he had an interest, and

(ii) making grants and loans of public funds to enterprises in which the defendant had an interest.

The acts described in this subparagraph B. were in violation of the following provisions of the Penal Code of the Republic of Venezuela:

Article 195:

"Every public official who abstracts funds or other personal property, the collection, custody, or administration of which has been entrusted to him by virtue of his office, shall be punished by hard labor for three to ten years.

"If the loss is not heavy, or if complete reparation is made before the guilty party is brought to trial, he shall suffer imprisonment for three to twenty-one months."

[fol. 276] Article 196:

"Every official who by abusing his office forces a person to give or to promise to him or to any third party any sum of money or other illicit profit or gift shall be punished by imprisonment for eighteen months to five years.

"If the amount or thing illicitly given or promised is of little value, the period of imprisonment shall be for three to twenty-one months."

Article 198:

"Every official who, for the performance of any official duty, receives for his own or another's account, a remuneration, whether in the form of money or any other thing which is not due him, or accepts any offer of such remuneration, shall be punished by imprisonment for one to two months."

Article 199:

"Every public official who receives or exacts a promise of money or other benefit, either directly or through [fol. 277] another person, for delaying or omitting any official duty, or for doing an act which is contrary to that duty, shall be punished by hard labor for a period

of three to five years. The term of hard labor shall be for a period of four to eight years if the offense has resulted in:

1. The grant of public office, emoluments, pensions or honors, or the award of contracts in which the agency employing the official has an interest.

2. Tending to cause any loss or injury to any of the parties to a civil action or to a party found guilty in a criminal proceeding.

"If the act has resulted in a conviction carrying a restriction of personal liberty in excess of six months, the term of hard labor shall be three to ten years."

Article 205:

"Every public official who directly, or through an intermediary or by deceit, obtains for himself any personal benefit in any act of public administration in [fol. 278] which he performs a function shall be punished with imprisonment for six months to five years."

Manuel Aristeguieta, Consul General of the Republic of Venezuela.

William G. Ward, Ward & Ward, 1240 duPont Building, Miami, Florida; Howard C. Westwood, per WHA, Covington & Burling, 701 Union Trust Building, Washington, D. C., Attorneys for Plaintiff.

[fol. 279] City of Miami,
County of Dade,
Southern District of Florida,
Miami Division, ss.:

Before me, the undersigned United States District Judge personally appeared, this 23rd day of November, 1959, Manuel Aristeguieta, Consul General of the Republic of Venezuela, located at Miami, Florida, who, upon being duly sworn, upon oath states that, upon information and belief, the allegations contained in the foregoing amend-

ment to the amended complaint filed herein on September 24, 1959, are true; and that such information and belief are based upon (a) his personal examination of the extradition documents in the case of Marcos Perez Jimenez forwarded to the Embassy of the Republic of Venezuela in Washington, D. C., by the Government of the Republic of Venezuela, all of which he has personally read, (b) instructions and advice from the Embassy of the Republic of Venezuela in Washington, D. C., and (c) consultation with his attorneys.

Wm. C. Mathes, United States District Judge.

[fol. 280]

IN UNITED STATES DISTRICT COURT

AMENDMENT NO. II TO AMENDED COMPLAINT FOR EXTRADITION—Filed November 23, 1959

Comes now Manuel Aristeguieta, the plaintiff herein and the Consul General of the Republic of Venezuela for the States of Florida, Georgia, and South Carolina, duly appointed and acknowledged by the Government of the Republic of Venezuela and duly recognized by the Government of the United States of America, and amends paragraphs 11 and 15 of his amended complaint for extradition herein to allege as follows:

11. Such extradition documents contain the record of the following proceeding under the law of the Republic of Venezuela:

Charges were filed against the defendant by the Attorney General of the Republic of Venezuela in the Federal Court of such Republic at Caracas, with voluminous supporting documentary evidence.

After the consideration of such charges and evidence, [fol. 281] such Court decreed on July 30, 1959, that sufficient cause had been established for the trial of the defendant on the charges.

Thereupon the order and ruling referred to in paragraph 7 of this amended complaint were issued on August 12, 1959.

Such Court, on August 13, 1959, determined that the National Executive of the Republic of Venezuela should request the extradition of the defendant from the United States of America on the basis of crimes within Article II of the aforesaid Treaty of Extradition; that justification for such extradition under such Treaty had been established as a matter of fact and law; and that, upon extradition, the defendant would be tried only for the offenses for which his extradition is requested and in no case for offenses of a political character. On November 10, 1959, the Federal Court clarified the aforesaid determination of August 13, 1959, by specifying that its naming sections 1, 2, 14 and 21 of Article II of the aforesaid Treaty was meant to be illustrative and not exclusive and that defendant's common crimes also came within other sections of said Article II, including, again without limitation, sections 18 and 20. A copy of the determination of August 13, 1959, is attached to the amended complaint as Exhibit G. An accurate English translation thereof is attached to the [fol. 282] amended complaint as Exhibit H, together with the affidavit of the translator as Exhibit I. A copy of the Federal Court's clarification of such determination, dated November 10, 1959, is attached to this amendment to the amended complaint as Exhibit N, together with an accurate English translation thereof as Exhibit O and the affidavit of the translator as Exhibit P.

The extradition documents are duly authenticated as required by law, including the authentication of the Ambassador of the United States of America in Caracas, Venezuela, being the authentication prescribed by 18 U.S. Code 3190. A copy of the authentications is attached to the amended complaint as Exhibit J.

15. The offenses thus charged against the defendant are crimes within Article II of the aforesaid Treaty of Extradition, including, but not limited to, sections 1, 2, 14, 18, 20 and 21 of said Article. The defendant is not exempt from prosecution or punishment therefor, from lapse of time or other lawful cause, under the laws of the Republic of Venezuela.

Manuel Aristeguieta, Consul General of the Republic of Venezuela.

[fol. 283] William G. Ward, Ward & Ward, 1240 Dupont Building, Miami, Florida; Howard C. Westwood, Covington & Burling, Union Trust Building, Washington 5, D. C., Attorneys for Plaintiff.

[fol. 290] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 297] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

—against—

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PETITION FOR PERMISSION TO FILE PETITION FOR WRIT OF PROHIBITION OR MANDAMUS WITH PETITION ATTACHED —Filed January 20, 1960

Petitioners, The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada, move this Court for leave to file a petition for a writ of prohibition or mandamus, which petition is hereto attached, and that an order to show cause be entered, directed to The Honorable William C. Mathes,

United States District Judge, and to the United States District Court for the Southern District of Florida, Miami Division, commanding them to be and appear before this Court within a time to be fixed by this Court to show cause why said petition should not be granted, and further move, in order to prevent irreparable loss to petitioners, that this Court order an immediate stay of all proceedings to enforce against petitioners subpoenas directed against them in the extradition proceeding entitled Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic Venezuela, Plaintiff, v. Marcos Perez Jimenez, Defendant, No. 9425-M-Civil, pending in the United States District Court for the Southern District of Florida, Miami Division, until said petition for a writ of prohibition or mandamus be heard and determined in this Court, and for such other and further relief as may be just.

[fol. 298] Dated at Miami, Florida, this 14th day of January, 1960.

The First National City Bank of New York, By Shearman & Sterling & Wright, and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; French American Banking Corporation, By Coudert Brothers, and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; The Royal Bank of Canada, By Sage, Gray, Todd & Sims, and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey, 401 Industrial National Bank Building, Miami, Florida.

Certificate of service (omitted in printing).

[fol. 299]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS —Filed January 20, 1960

To the Honorable Chief Judge and Judges of the United States Court of Appeals for the Fifth Circuit:

The Petition of the First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada against The Honorable William C. Mathes, United States District Judge, and the United States District Court for the Southern District of Florida, Miami Division, respectfully shows:

1. Your petitioners, The First National City Bank of New York (hereinafter called "City Bank"), French American Banking Corporation (hereinafter called "French American") and The Royal Bank of Canada (hereinafter called "Royal Bank"), were each served with a subpoena duces tecum in New York City on or about December 2, 1959.

2. The subpoenas were addressed to officers of petitioners in New York City and required appearance before the United States District Court for the Southern District of Florida, Miami Division, and the production of records of bank accounts of 21 named persons and entities for the period March 14, 1949 to November 25, 1959. Such records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence. A copy of the subpoena served on City Bank is annexed hereto as Exhibit A. A copy of the subpoena served on French American is annexed hereto as Exhibit B. A copy of the subpoena served on Royal Bank is annexed hereto as Exhibit C.

[fol. 300] 3. Each subpoena states that it is issued on motion of the plaintiff (the diplomatic representative of

the demanding country) in a proceeding for extradition under Section 3184 of Title 18, U. S. Code, and pursuant to the Treaty of Extradition between the United States and Venezuela [43 Stat. 1698 (1923)].

4. The extradition proceeding referred to in Paragraph 3 above is entitled Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff, v. Marcos Perez Jimenez, Defendant, and was commenced on or about August 24, 1959 by the filing of a complaint with the United States District Court for the Southern District of Florida, Miami Division. Such complaint seeks the extradition of Marcos Perez Jimenez on the grounds of complicity in homicides, extortion, bribery, illicit enrichment, embezzlement and criminal malversation.

5. On November 16, 1959 an order was entered in the aforesaid extradition proceeding directing that such proceeding would be governed by the Federal Rules of Criminal Procedure and that the Federal Rules of Civil Procedure would not apply. A copy of such order is annexed hereto as Exhibit D.

6. On November 23, 1959 an order was entered in the aforesaid extradition proceeding vacating the order entered on November 13, 1959 and reciting that it is the opinion of the Court that the procedure in such proceeding is to be governed as stated in the Treaty and that the right of subpoena exists as relates to witnesses. A copy of such order is annexed hereto as Exhibit E. Both said orders of November 16 and 23 were made without notice to the petitioners and prior to the service of the aforesaid subpoenas.

7. On December 14, 1959 each petitioner, together with certain other persons, moved to quash the aforesaid subpoenas. A copy of such motion is annexed hereto as Exhibit F. The grounds for such motion were as follows:

(a) A District Judge or a District Court lacks jurisdiction and power to issue a subpoena on behalf of the demanding country in an extradition proceeding;

[fol. 301] (b) An extradition proceeding is civil in nature and the District Judge or District Court has no jurisdiction or power to issue a subpoena commanding the appearance in Florida of witnesses served outside of the district and more than 100 miles from the place of hearing; and

(c) Compliance with the subpoenas would be burdensome and oppressive.

8. On December 15, 1959 an order was made by The Honorable William C. Mathes, United States District Judge, denying the motion to quash the subpoenas and modifying the subpoenas in certain respects. A copy of such order is annexed hereto as Exhibit G.

9. On January 4, 1960 an order was made by The Honorable William C. Mathes, adjourning the return date of the aforesaid subpoenas to January 27, 1960. Judge Mathes refused to adjourn the return date indefinitely pending the hearing and determination of the appeal referred to in Paragraph 12 below.

10. It is respectfully submitted that the issuance of the said subpoenas was an assertion of nonexistent power and exceeded the jurisdiction of a District Judge or a District Court for the reasons that the subpoena power cannot be exercised on behalf of the demanding country in an extradition proceeding, and, in any event, the court has no power to issue in such proceeding a subpoena for service upon a witness outside the district and not within 100 miles of the place of hearing. Accordingly, the District Judge or District Court should be directed by this Court to vacate the order entered on December 15, 1959 and to quash the aforesaid subpoenas.

11. It is also respectfully submitted that the issuance of a writ of prohibition or mandamus is the proper remedy to compel the District Judge or District Court to refrain from exceeding his or its power and jurisdiction.

12. Petitioners have also taken an appeal from the order of Judge Mathes entered on December 15, 1959. It is re-

spectfully requested that this Court hear argument on such appeal and on this petition at the same time.

[fol. 302] Wherefore, petitioners pray that a writ of prohibition or mandamus issue, directing the Honorable William C. Mathes, United States District Judge, and the United States District Court for the Southern District of Florida, Miami Division, to vacate and set aside the order entered on December 15, 1959 and referred to in Paragraph 8 above, to make an order quashing the aforesaid subpoenas, to cease and refrain from issuing subpoenas on behalf of the demanding country in the aforesaid extradition proceeding and for such other and further relief as may be just.

Dated at Miami, Florida this 14th day of January, 1960.

The First National City Bank of New York, By Shearman & Sterling & Wright, and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; French American Banking Corporation, By Coudert Brothers, and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey; The Royal Bank of Canada, By Sage, Gray, Todd & Sims, and Fowler, White, Gillen, Humkey & Trenam, By Walter Humkey, 401 Industrial National Bank Building, Miami, Florida.

Duly sworn to by Walter Humkey, jurat omitted in printing.

[fol. 303] Certificate of service (omitted in printing).

[fol. 304]

EXHIBIT A TO PETITION

Subpoena to The First National City Bank (George F. Nolte) and return on service and Schedule omitted. Printed on page 23, side folio 42, ante.

[fol. 307]

EXHIBIT B TO PETITION

Subpoena to French American Banking Corporation (Walter Anderson) and return on service and Schedule omitted. Printed on page 26, side folio 47, ante.

[fol. 311]

EXHIBIT C TO PETITION

Subpoena to Royal Bank of Canada (J. W. Ganaan) and return on service and Schedule omitted. Printed on page 30, side folio 53, ante.

[fol. 314]

EXHIBIT D TO PETITION

Order vacating notice of taking deposition, etc., dated November 13, 1959 omitted. Printed on page 2, side folio 2, ante.

[fol. 316]

EXHIBIT E TO PETITION

Order vacating order dated November 13, 1959, etc. (copy) omitted. Printed on page 3, side folio 4, ante.

[fol. 317]

EXHIBIT F TO PETITION

Motion of The First National City Bank of New York, et al. to quash omitted. Printed on page 6, side folio 9, ante.

[fol. 319]

EXHIBIT G TO PETITION

Order on hearing of December 14, 1959 granting modification of subpoenas and denying motions omitted. Printed on page 10, side folio 15, ante.

[fol. 357] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR FIFTH CIRCUIT

No. 18176

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan corporation, Petitioners,

v.

MANUEL ARISTEGUITA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

MOTION OF FORTUNATO HERRARA, ET AL., FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION OR STAY OF PROCEEDINGS PENDING APPEAL, WITH PETITION ATTACHED—Filed January 20, 1960

Come Now Fortunato Herrara and Polinversiones, C.A., a Venezuelan corporation, and respectfully move the Court for leave to file their petition for writ of prohibition or stay of further proceedings as to them pending appeal as follows:

I. Your petitioners, Fortunato Herrara and Polinversiones, C.A., a Venezuelan corporation, respectfully show unto the Court that they are depositors and owners of certain bank accounts in divers New York City banks named in the extradition proceedings below, viz., First National City Bank, French American Banking Corporation and Royal Bank of Canada, each of New York City, New York, whose records of deposits and withdrawals have been ordered produced before the United States District Court for the Southern District of Florida, Miami Division, under order of January 4, 1960, and subpoenas issued and served upon said banks prior to said order, all of which affirmatively appear on the record of proceedings in the lower court extradition proceeding which has been duly filed in this Court in the appeal styled The First National City Bank of New York, The French American Banking Cor-

poration and The Royal Bank of Canada, appellants, vs. [fol. 358] Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, appellee, reference to which is hereby prayed, said record being hereby adopted for the purposes hereof.

II. Petitioners not being parties to the lower court proceeding, upon being advised that bank records pertaining to their private bank accounts in the aforesaid banks had been subpoenaed by the above designated court, appeared before said court in said extradition proceeding pursuant to notice, on January 4, 1960, and submitted their motion to quash said subpoenas, as per copy hereto attached as "Appendix A" and specifically made a part hereof. "Appendix B" reflects subpoena and "schedule" served upon one of said banks, identical subpoenas having been served upon each of said institutions.

III. At said hearing the court entertained and considered petitioners' motion, and by its order of January 4, 1960, denied said motion. Copy of said order is hereto attached as "Appendix C" and specifically made a part hereof.

IV. That under the aforesaid order, bank records pertaining to your petitioners' private bank accounts will be produced under compulsory process before the trial court, sitting as a magistrate in said extradition proceeding, on January 24, 1960, unless this Honorable Court intervenes to protect petitioners' rights and interests by issuance of an alternative writ of prohibition or rule to show cause pending a final hearing hereof, or in the alternative, an order directing a stay of further proceedings pending final hearing on appeal.

V. For the purpose of vesting jurisdiction in this Court to issue a stay order pending final hearing on appeal, should the Court elect such alternative method, these petitioners have duly entered their notice of appeal from the January 4, 1960 order aforesaid, per copy thereof attached as "Appendix D" and specifically made a part of this petition.

[fol. 359] VI. Petitioners would respectfully show unto the Court that Federal District Courts have only such subpoena power as is granted by the Constitution and Acts of Congress, and that nowhere is the power granted to the District Court sitting as a magistrate in an extradition proceeding to issue subpoenas or discovery process of any type. Such a hearing is not a suit of a civil nature, within the meaning of the Federal Rules of Civil Procedure, and in fact, has been defined as being the equivalent of a preliminary hearing before a committing magistrate. See *In re Extradition of Wadge*, 15 F. 874, Aff. 16 F. 332.

VII. Petitioners further show unto the Court that under *Title 18, U.S.C. 3184*, the sole function and power of a judge of a United States District Court following issuance of a warrant for the apprehension of a person charged with having committed a crime within the jurisdiction of a demanding foreign government, is to have the person so charged brought before him "to the end that the evidence of criminality may be heard and considered". The statute presupposes that the demanding government which has generated the filing of affidavit and complaint to bring about the arrest and extradition of the accused person, is in position to comply with the provisions of treaty and statute by submitting evidence of criminality of a quantum and quality sufficient to satisfy the magistrate that the evidence is sufficient to sustain the charge "under the provisions of the proper treaty or convention", and there exists no authority whatever for such committing magistrate to grant almost unlimited search and seizure process in aid of the petitioner's effort to seek out evidence of criminality in this country, or to grant to the plaintiff the equivalent of compulsory discovery process under our rules of procedure under which to conduct a veritable fishing expedition into the records of many banks of this country, not to [fol. 360] procure a particular witness or a particular paper as a part of plaintiff's proof, but in a secondary and corollary effort to determine under what name or in what bank the defendant deposited or secreted that which the warrant charges he embezzled in the demanding foreign jurisdiction. In this regard the plaintiff, having filed "evidence of

criminality", then seeks to misuse extradition procedure as a vehicle for prying and delving into the private bank accounts and business records of many persons and corporations, which is wholly impertinent and irrelevant to the limited function and duty of the magistrate to determine upon evidence of criminality in such special and limited proceeding.

VIII. Petitioners further say that unless this Honorable Court exercises its appellate and supervisory jurisdiction to prevent an unprecedented and improper invasion of petitioners' rights and interests in the premises, petitioners will have no remedy whatever and the damage and injury now apprehended will be imposed upon them since in extradition cases involving a fugitive from justice of a foreign country, the judge or magistrate acts under special authority conferred by treaties and Acts of Congress in that limited field only, and no appeal from his decision is given by the law under which he acts. See *Collins* v. *Miller*, 40 S. Ct. 347, 252 U. S. 364, 64 L. Ed. 616; *In re Kene's Extradition*, D.C. Tex. 1934, 6 F. Supp. 308; 10 Op. Atty. Gen. 501. Hence, since an extradition proceeding stands almost alone in the jurisprudence of the country in denying both parties a right of appeal from whatever may be the final judgment of the magistrate, petitioners say that the instant attempt on their part to restrain an unjust and unprecedented search and invasion into their private rights and private property by process issued by the district judge in a case in which they are not even parties and in which they have not even been subpoenaed as witnesses is the sole [fol. 361] method afforded petitioners by the law of the land to prevent the execution of an oppressive and highly improper order of a court acting in excess of its lawful jurisdiction.

Wherefore, petitioners pray that this Honorable Court issue its writ of prohibition directing the Honorable William C. Mathes, acting as Judge of the United States District Court for the Southern District of Florida, Miami Division, to proceed no further in the extradition action hereinabove described in so far as same, or any subpoena or order therein, requires information, testimony or rec-

ords of or from any party whomsoever pertaining to the private bank accounts of petitioners in The First National City Bank of New York, or The French American Banking Corporation of New York, or The Royal Bank of Canada, New York branch, pending final hearing hereof, and that upon such final hearing the Court issue its writ of prohibition, permanently prohibiting such further proceedings against these petitioners as same involve or pertain to their private bank accounts in the aforenamed New York banking establishments.

In the alternative, petitioners pray that this Honorable Court will, in the exercise of its appellate and supervisory jurisdiction, issue an order directing a stay and abatement of any and all further proceedings against them pending final hearing upon the appeal of which petitioners have given due notice, in so far as such further proceedings would involve, affect or reveal petitioners' private business affairs or facts or records pertaining to their private bank accounts aforesaid.

Richard H. Hunt, 704 Ainsley Building, Miami 32, Florida, Attorney for Fortunato Herrara and Polinversiones, C.A.

[fol. 362] *Duly sworn to by Richard H. Hunt, jurat omitted in printing.*

[fol. 363] APPENDIX A TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

v.

MARCOS PEREZ JIMENEZ, Defendant.

MOTION TO QUASH—Filed December 28, 1959

FORTUNATO HERRARA and POLINVERSIONES, C.A., by and through their undersigned attorney, move this court for an order quashing the subopenas duces tecum served upon George F. Nolte, Assistant Vice-President, First National City Bank of New York, New York; Walter Anderson, Secretary, French American Banking Corporation, New York City, New York; Isaac B. Grainger, President, Chemical Corn Exchange Bank, New York City, New York; J. W. Ganaan, Agent, Royal Bank of Canada, New York City, New York, and Wallace M. Davis, President, The Hibernia National Bank of New Orleans, Louisiana, requiring the production of documents, records, and other materials contained in the account or accounts of Fortunato Herrara and Polinversiones, C.A., at the foregoing respective banks, originally returnable before this court on Monday, December 14, 1959, at 10:00 a.m., and subsequently continued until January 4, 1960, at 10:00 a.m., by order dated December 15, 1959. Fortunato Herrara and Polinversiones, C.A., file this pleading solely for the purpose of moving to suppress or quash the subpoenas, and solely to suppress or quash those portions of the subpoenas pertaining to the account or accounts of Fortunato Herrara and Polinversiones, C.A. This motion does not constitute a general appearance

[fol. 364] by either moving party, nor a submission to the jurisdiction of this court for any purpose other than a special appearance to argue this particular motion. Grounds for the motion are as follows:

1. Neither Fortunato Herrara nor Polinversiones, C.A., is a party to this proceeding. The subpoenas duces tecum referred to above attempt to require the named banks to produce the records of account which are the personal and private property of the moving parties, and to which they claim a right of privacy and privilege.

2. The subpoenas duces tecum were properly served, and were served in New York City, New York, which is outside this district at a distance of more than 100 miles therefrom.

3. This cause is an extradition proceeding and this court has no jurisdiction to obtain by subpoena power the persons and records sought to be obtained by said subpoenas duces tecum.

4. The documents, records, and other materials contained in the account or accounts of Fortunato Herrara and Polinversiones, C.A., are not material or relevant to this cause.

5. Said subpoenas duces tecum, and each of them, in so far as they pertain to these petitioners, are in the nature of a fishing expedition into the personal affairs of a person not a party to this cause.

/s/ Richard N. Hunt
Attorney for Fortunato Herrara and
Polinversiones, C.A.

I Hereby Certify that a copy of the foregoing Motion to Quash was mailed to: Ward & Ward, Attorneys for Plaintiff, DuPont Building, Miami, Florida; Walters, Moore & Constanzo, Attorneys for Defendant, 1008 Ainsley Building, Miami, Florida, and Fowler, White, Gillen, Humkey & Trenam, Attorneys for The First National City Bank of New York, French American Banking Corporation, and Royal Bank of Canada, 401 Industrial National Bank Building, Miami, Florida, this 24 day of December, 1959.

/s/ Richard N. Hunt

[fol. 365]

APPENDIX B TO MOTION

Subpoena served on George F. Nolte and schedule (copy) omitted. Printed on page 23, side folio 42, ante.

[fol. 369]

APPENDIX C TO MOTION

Order after hearing of January 4, 1960 on motions to quash subpoenas, motions to extend the return day of subpoenas, and other matters (copy) omitted. Printed on page 17, side folio 26, ante.

[fol. 387] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

18176

SILVIO GUTIERREZ, Petitioner,

—against—

THE HONORABLE WILLIAM C. MATHES, United States District Judge and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS—
Filed January 20, 1960

To the Honorable Chief Judge and Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of Silvio Gutierrez against The Honorable William C. Mathes, United States District Judge, and the United States District Court for the Southern District of Florida, Miami Division, respectfully shows:

1. The Chemical Corn Exchange Bank, New York, in which the petitioner has been at all relevant times a de-

positor, was served with a subpoena duces tecum in New York City on or about December 3, 1959.

2. The subpoena was addressed to Isaac B. Grainger, President of the Chemical Corn Exchange Bank in New York City and required appearance before the United States District Court for the Southern District of Florida, Miami Division, and the production of records of the bank account of petitioner and other named persons and entities for the period March 14, 1949 to November 25, 1959. Such records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence. A copy of the subpoena served on Chemical Corn Exchange Bank is annexed hereto as Exhibit "A".

3. The subpoena states that it is issued on motion of the plaintiff (the diplomatic representative of the demanding country in a proceeding for extradition under Section 3184 of Title 18, U. S. Code, and pursuant to the Treaty of Extradition between the United States and Venezuela (43 Stat. 1698 (1923)).

4. The extradition proceeding referred to in Paragraph 3 above is entitled Manuel Aristequieta, Consul General of [fol. 388] the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff, v. Marcos Perez Jimenez, Defendant, and was commenced on or about August 24, 1959 by the filing of a complaint with the United States District Court for the Southern District of Florida, Miami Division. Such complaint seeks the extradition of Marcos Perez Jimenez on the grounds of complicity in homicides, extortion, bribery, illicit enrichment, embezzlement and criminal malversation.

5. On December 11, 1960 petitioner moved to quash the subpoena. A copy of this motion is annexed as Exhibit "B". The grounds for the motion are as follows:

> (1) Silvio Gutierrez is not a party to this proceeding. The subpoena duces tecum referred to above attempts to require the bank to produce the records of account which are his personal and private property, to which he has a right of privacy and privilege.

(2) The production of these personal and private records of Silvio Gutierrez will be likely to prejudice him and members of his family in that it would be likely to lead to reprisals against them by the Venezuelan Government which is represented by the plaintiff in this suit.

(3) This cause is an extradition proceeding in which this Court has no jurisdiction to issue a subpoena duces tecum at the request of or in behalf of the demanding country, the plaintiff.

(4) The documents, records and other materials contained in the account or accounts of Silvio Gutierrez are not material or relevant to this cause.

(5) The subpoena was improperly served since it appears on its face that it was served at a place outside the district in which the hearing is to be held and at a distance greater than 100 miles from the place of the hearing.

6. On December 15, 1959 an order was made by The Honorable William C. Mathes, United States District Judge, denying the motion to quash the subpoenas and modifying [fol. 389] the subpoenas in certain respects. A copy of this order is annexed as Exhibit "C".

7. On January 4, 1960 an order was made by The Honorable William C. Mathes, adjourning the return date of the aforesaid subpoena to January 27, 1960. Judge Mathes refused to adjourn the return date indefinitely pending the hearing and determination of the appeal of petitioner referred to in Paragraph 10 below.

8. It is respectfully submitted that the issuance of the subpoena was an assertion of nonexistent power and exceeded the jurisdiction of a District Judge or a District Court for the reasons that the subpoena power cannot be exercised on behalf of the demanding country in an extradition proceeding, and, in any event, the court has no power to issue in such proceeding a subpoena for service upon a witness outside the district and not within 100 miles of the place of hearing. Accordingly, the District Judge or Dis-

trict Court should be directed by this Court to vacate the order entered on December 15, 1959 and to quash the aforesaid subpoena.

9. It is also respectfully submitted that the issuance of a writ of prohibition or mandamus is the proper remedy to compel the District Judge or District Court to refrain from exceeding his or its power and jurisdiction.

10. Petitioner has taken appeal from the order of Judge Mathes entered on December 15, 1959. It is respectfully requested that this Court consider such appeal and this petition at the same time.

Wherefore, petitioner prays that a writ of prohibition or mandamus issue, directing the Honorable William C. Mathes, United States District Judge, and the United States District Court for the Southern District of Florida, Miami Division, to vacate and set aside the order entered on December 15, 1959 and referred to in Paragraph 6 above, to make an order quashing the aforesaid subpoena, to cease and refrain from issuing subpoenas on behalf of the demanding country in the aforesaid extradition proceeding and for such other and further relief as may be just.

[fol. 390] Dated at Miami, Florida this 19 day of January, 1960.

Silvio Gutierrez by Smathers, Thompson & Dyer,
By Samuel A. Brodnax, Jr.

Duly sworn to by Samuel A. Brodnax, Jr., jurat omitted in printing.

Certificate of service (omitted in printing).

[fol. 408]

EXHIBIT A TO PETITION

THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

FILED MIAMI, FLA.
DEC. 14, 1959
JULIAN A. BLAKE, CLERK

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

SUBPOENA

To: ISAAC B. GRAINGER, President
Chemical Corn Exchange Bank
165 Broadway
New York 15, N. Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N. E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; PROVIDED that such appearance need not

be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

If counsel for the plaintiff or defendant take copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C. A.
Edificio Washington, C. A.

[fol. 409] the contents of such copies shall not be disclosed by such counsel to any person other than the Plaintiff or the Defendant herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

November 25, 1959

/s/ Wm. C. Mathes
U. S. District Judge

Return on Service

Received this subpoena at New York City on Nov. 30, 1959 and on Dec. 3, 1959 at 165 Broadway served it on the within named Isaac B. Grainger, Pres. by (illegible) by delivering a copy to him and tendering to him the fee for one

Marilyn Ryan, Sec't.

day's attendance and the mileage allowed by law. (Chk. $119.68).

Dated:
December 3, 1959

/s/ THOMAS J. LURNEY
U.S. Marshal

By /s/ HARRY J. CARITO
Deputy

Service Fees
Travel $
Services

Total $

SUBSCRIBED AND SWORN TO before me, a this 4th day of December, 1959.

/s/ FRANK P. COSTA
Notary Public
Commission Expires March 30, 1960
(SEAL)

U.S. Marshal
S.D.N.Y.
Fees .50
Mileage .30
.80

[fol. 410]

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in the Chemical Corn Exchange Bank in the name of for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) deposited or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in the Chemical Corn

Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez

Flor Chalbaud de Perez Jimenez

Margot Perez Chalbaud

Florangel Perez Chalbaud

Maria Sol Perez Chalbaud

Flor de Maria Perez Chalbaud

Rosa Perez Jimenez de Vargas

Francisco Perez Jimenez

Juan Perez Jimenez

Napoleon Dupouy

Laureano Vallenilla Lanz

Luis Felipe Llovera Paez

Carlos Pulido Barreto

Fortunato Herrera (Haddad)

Silvio Gutierrez

Pedro A. Gutierrez Alfaro

Lola T. Gutierrez Alfaro

Pedro A. Peters

Virgil C. Applewhite

Polinversiones, C. A.

Edificio Washington, C.A.

7. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

I certify the foregoing to be a true
and correct copy of the original.

Julian A. Blake, Clerk
United States District Court
Southern District of Florida

By: /s/ ELEANOR A. MCGINTY
Deputy Clerk

(SEAL)

[fol. 411]

EXHIBIT B TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

FILED, MIAMI, FLA.
DEC. 11, 1959
JULIAN A. BLAKE, CLERK

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

vs.

MARCOS PEREZ JIMENEZ, Defendant.

MOTION TO QUASH

SILVIO GUTERREZ, by and through his undersigned attorneys, moves this Court for an order quashing the subpoena duces tecum served upon Isaac B. Grainger, President, Chemical Corn Exchange Bank, New York, New York, requiring the production of documents, records and other materials contained in the account or accounts of Silvio Gutierrez at that bank, returnable before this Court on Monday, December 14, 1959 at 10:00 A. M. Silvio Gutierrez files this pleading solely for the purpose of moving to suppress or quash the subpoena and solely to suppress or quash the portion of the subpoena pertaining to the account or accounts of Silvio Gutierrez. Grounds for the motion are as follows:

1. Silvio Gutierrez is not a party to this proceeding. The subpoena duces tecum referred to above attempts to require the bank to produce the records of account which are his personal and private property, to which he has a right of privacy and privilege.

2. The production of these personal and private records of Silvio Gutierrez will be likely to prejudice him and members of his family in that it would be likely to lead to reprisals against them by the Venezuelan Government which is represented by the Plaintiff in this suit.

3. This cause is an extradition proceeding in which this Court has no jurisdiction to issue a subpoena duces tecum at the request of or in behalf of the demanding country, the Plaintiff.

[fol. 412] 4. The documents, records and other materials contained in the account or accounts of Silvio Gutierrez are not material or relevant to this cause.

5. The subpoena was improperly served since it appears on its face that it was served at a place outside the district in which the hearing is to be held and at a distance greater than 100 miles from the place of the hearing.

SMATHERS, THOMPSON & DYER

By SAMUEL A. BRODNAX, JR.
Attorneys for Silvio Gutierrez

I HEREBY CERTIFY that a true copy of the foregoing Motion was delivered to Ward and Ward, DuPont Building, Miami, Florida and Walters, Moore & Constanzo, 1008 Ainsley Building, Miami, Florida, and mailed to Covington & Burling, 701 Union Trust Building, Washington, D. C. on December 11, 1959.

SAMUEL A. BRODNAX, JR.
Of Counsel

[SEAL]

I certify the foregoing to be a true
and correct copy of the original.

Julian A. Blake, Clerk
United States District Court
Southern District of Florida

By: /s/ ELEANOR A. McGINTY
Deputy Clerk

[fol. 427] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

18176

NAPOLEON DUPOUY, Petitioner,

v.

THE HONORABLE WILLIAM C. MATHES, United States District Judge and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PETITION OF NAPOLEON DUPOUY TO FILE PETITION FOR WRIT OF PROHIBITION OR MANDAMUS—Filed January 22, 1960

To the Honorable Chief Judge and Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of Napoleon Dupouy against The Honorable William C. Mathes, United States District Judge, and the United States District Court for the Southern District of Florida, Miami Division, respectfully shows:

1. The First National City Bank of New York and The French American Banking Corporation, in which the petitioner has been at all relevant times a depositor, were served with subpoenas duces tecum in New York City on or about December 14, 1959.

2. The subpoenas were addressed to George F. Nolte, Assistant Vice President of The First National City Bank of New York and to Walter Anderson, Secretary, The French American Banking Corporation and required appearance before the United States District Court for the Southern District of Florida, Miami Division, and the production of records of the bank accounts of petitioner and other named persons and entities for the period March 14, 1949 to November 25, 1959. Such records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence.

A copy of the subpoena served on The First National City Bank of New York is annexed hereto as Exhibit A. A copy of the subpoena served on The French American Banking Corporation is annexed hereto as Exhibit B.

3. The subpoena, in each instance, states that it is issued on motion of the plaintiff (the diplomatic representative of the demanding country in a proceeding for extradition under Section 3184 of Title 18, U. S. Code, and pursuant to [fol. 428] the Treaty of Extradition between the United States and Venezuela (43 Stat. 1698 (1923)).

4. The extradition proceeding referred to in Paragraph 3 above is entitled Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff v. Marcos Perez Jimenez, Defendant, and was commenced on or about August 24, 1959 by the filing of a complaint with the United States District Court for the Southern District of Florida, Miami Division. Such complaint seeks the extradition of Marcos Perez Jimenez on the grounds of complicity in homicides, extortion, bribery, illicit enrichment, embezzlement and criminal malversation.

5. On December 11, 1960 petitioner moved to quash the subpoena. A copy of this motion is annexed as Exhibit C. The grounds for the motion are as follows:

> 1. The said subpoenas duces tecum were improperly served in that they were served in New York, N. Y. which is outside this district and more than 100 miles therefrom.
>
> 2. This cause is an extradition proceeding and this Court has no jurisdiction to obtain by subpoena power the persons and records sought to be obtained by said subpoena duces tecum.
>
> 3. The said subpoenas duces tecum, and each of them, seek to obtain records that in no way pertain to this cause and which cannot lead to the discovery of information relevant to this cause.

4. The said subpoenas duces tecum, and each of them, seek to obtain records that are in no way material to this cause and which cannot lead to the discovery of records material to this cause.

5. The said subpoenas duces tecum, and each of them, seek to obtain information not relevant to this cause and which is personal to petitioner and privileged.

6. The said subpoenas duces tecum, and each of them, insofar as they pertain to petitioner, are in the nature of a fishing expedition into the personal affairs of a person not a party to this cause.

6. On December 15, 1959 an order was made by The Honorable William C. Mathes, United States District Judge, denying the motion to quash the subpoenas and modifying the subpoenas in certain respects. A copy of this order is annexed as Exhibit D.

[fol. 429] 7. On January 4, 1960 an order was made by The Honorable William C. Mathes, adjourning the return date of the aforesaid subpoenas to January 27, 1960. Judge Mathes refused to adjourn the return date indefinitely pending the hearing and determination of the appeal of petitioner referred to in Paragraph 10 below.

8. It is respectfully submitted that the issuance of the subpoena was an assertion of nonexistent power and exceeded the jurisdiction of a District Judge or a District Court for the reasons that the subpoena power cannot be exercised on behalf of the demanding country in an extradition proceeding, and, in any event, the court has no power to issue in such proceeding a subpoena for service upon a witness outside the district and not within 100 miles of the place of hearing. Accordingly, the District Judge or District Court should be directed by this Court to vacate the order entered on December 15, 1959 and to quash the aforesaid subpoena.

9. It is also respectfully submitted that the issuance of a writ of prohibition or mandamus is the proper remedy to

compel the District Judge or District Court to refrain from exceeding his or its power and jurisdiction.

10. Petitioner has taken appeal from the order of Judge Mathes entered on December 15, 1959. It is respectfully requested that this Court consider such appeal and this petition at the same time.

Wherefore, petitioner prays that a writ of prohibition or mandamus issue, directing the Honorable William C. Mathes, United States District Judge, and the United States District Court for the Southern District of Florida, Miami Division, to vacate and set aside the order entered on December 15, 1959 and referred to in Paragraph 6, above, to make an order quashing the aforesaid subpoenas, to cease and refrain from issuing subpoenas on behalf of the demanding country in the aforesaid extradition proceeding and for such other and further relief as may be just.

Dated at Miami, Florida, this 21st day of January, 1960.

Napoleon Dupouy, by Scott McCarthy Preston Steel & Gilleland, By Dwight Sullivan, 1414 First National Bank Bldg., Miami 32, Florida.

[fol. 430] *Duly sworn to by Dwight Sullivan, jurat omitted in printing.*

Certificate of service (omitted in printing).

[fol. 439]

EXHIBIT C TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEOVIETA, Consul General of the Republic of Venezuela, Plaintiff,

—vs—

MARCOS PEREZ JIMENEZ, Defendant.

MOTION TO QUASH
SUBPOENA DUCES TECUM

Comes now NAPOLEON DUPOUY, by and through his undersigned attorneys, and moves this Court for an order quashing the subpoenas duces tecum served in this cause upon the French American Banking Corporation and the First National City Bank of New York, insofar as said subpoenas duces tecum pertain to him, on the following grounds:

1. The said subpoenas duces tecum were improperly served in that they were served in New York, N. Y. which is outside this district and more than 100 miles therefrom.

2. This cause is an extradition proceeding and this Court has no jurisdiction to obtain by subpoena power the persons and records sought to be obtained by said subpoenas duces tecum.

3. The said subpoenas duces tecum, and each of them, seek to obtain records that in no way pertain to this cause and which cannot lead to the discovery of information relevant to this cause.

4. The said subpoenas duces tecum, and each of them, seek to obtain records that are in no way material to this cause and which cannot lead to the discovery of records material to this cause.

5. The said subpoenas duces tecum, and each of them, seek to obtain information not relevant to this cause and which is personal to petitioner and privileged.

[fol. 439a] 6. The said subpoenas duces tecum, and each of them, insofar as they pertain to petitioner, are in the nature of a fishing expedition into the personal affairs of a person not a party to this cause.

SCOTT MCCARTHY PRESTON STEEL & GILLELAND

By .....
Dwight Sullivan
Attorneys for Petitioner, Napoleon Dupouy
1414 First National Bank Building
Miami 32, Florida

I HEREBY CERTIFY that a copy of the foregoing was delivered to each of the following: WARD & WARD, Attorneys for Plaintiff; WALTERS, MOORE & COSTANZO, Attorneys for Defendant; WALTER HUMKEY, Attorney for French American Banking Corporation and the First National City Bank of New York; SMATHERS, THOMPSON & DYER, Attorneys for Silvio Gutierrez; this 11th day of December, 1959.

.....
Attorney

[fol. 465]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO,
Petitioners,

—vs.—

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

MOTION OF PEDRO A. GUITERREZ ALFARO, ET AL., FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION OR STAY OF PROCEEDINGS PENDING APPEAL, WITH PETITION ATTACHED—Filed January 22, 1960

Come Now Pedro A. Guiterrez Alfaro and Lola T. de Guitterrez Alfaro, also known as Lola T. de Guiterrez Alfaro and respectfully move the Court for leave to file their petition for writ of prohibition or stay of further proceedings as to them pending appeal as follows:

I. Your petitioners, Pedro A. Guiterrez Alfaro and Lola T. de Guitterrez Alfaro, also known as Lola T. Guiterrez Alfaro, respectfully show unto the Court that they are depositors and owners of certain bank accounts in a certain New York City bank named in the extradition proceedings below, viz., First National City Bank, of New York City, New York, whose records of deposits and withdrawals have been ordered produced before the United States District Court for the Southern District of Florida, Miami Division, under order of January 4, 1960, and subpoenas issued and served upon said bank prior to said order, all of which affirmatively appear on the record of proceedings in the lower court extradition proceeding which has been duly [fol. 465a] filed in this Court in the appeal styled The First National City Bank of New York, The French American

Banking Corporation and The Royal Bank of Canada, appellants, vs. Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, appellee, reference to which is hereby prayed, said record being hereby adopted for the purposes hereof.

II. Petitioners not being parties to the lower court proceeding, upon being advised that bank records pertaining to their private bank accounts in the aforesaid bank had been subpoenaed by the above designated court, appeared before said court in said extradition proceeding pursuant to notice, on January 4, 1960, and submitted their motion to quash said subpoenas, as per copy hereto attached as "Appendix A" and specifically made a part hereof. "Appendix B" reflects subpoena and "schedule" served upon said bank, identical subpoenas having been served upon each of said institutions.

III. At said hearing the court entertained and considered petitioners' motion, and by its order of January 4, 1960, denied said motion. Copy of said order is hereto attached as "Appendix C" and specifically made a part hereof.

IV. That under the aforesaid order, bank records pertaining to your petitioners' private bank accounts will be produced under compulsory process before the trial court, sitting as a magistrate in said extradition proceedings, on January 24, 1960, unless this Honorable Court intervenes to protect petitioners' rights and interests by issuance of an alternative writ of prohibition or rule to show cause pending a final hearing hereof, or in the alternative, an order directing a stay of further proceeding pending final [fol. 466] hearing on appeal.

V. For the purpose of vesting jurisdiction in this Court to issue a stay order pending final hearing on appeal, should the Court elect such alternative method, these petitioners have duly entered their notice of appeal from the January 4, 1960 order aforesaid, per copy thereof attached as "Appendix D" and specifically made a part of this petition.

VI. Petitioners would respectfully show unto the Court that Federal District Courts have only such subpoena power as is granted by the Constitution and Acts of Congress, and that nowhere is the power granted to the District Court sitting as a magistrate in an extradition proceeding to issue subpoenas or discovery process of any type. Such a hearing is not a suit of a civil nature, within the meaning of the Federal Rules of Civil Procedure, and in fact, has been defined as being the equivalent of a preliminary hearing before a committing magistrate. See *In re Extradition of Wadge*, 15 F. 874, Aff. 16 F. 332.

VII. Petitioners further show unto the Court that under Title 18, U.S.C. 3184, the sole function and power of a judge of a United States District Court following issuance of a warrant for the apprehension of a person charged with having committed a crime within the jurisdiction of a demanding foreign government, is to have the person so charged brought before him "to the end that the evidence of criminality may be heard and considered". The statute presupposes that the demanding government which has generated the filing of affidavit and complaint to bring about the arrest and extradition of the accused person, is in position to comply with the provisions of treaty and statute by submitting evidence of criminality of a quantum and quality [fol. 467] sufficient to satisfy the magistrate that the evidence is sufficient to sustain the charge "under the provisions of the proper treaty or convention", and there exists no authority whatever for such committing magistrate to grant almost unlimited search and seizure process in aid of the petitioner's effort to seek out evidence of criminality in this country, or to grant to the plaintiff the equivalent of compulsory discovery process under our rules of procedure under which to conduct a veritable fishing expedition into the records of many banks in this country, not to procure a particular witness or a particular paper as a part of plaintiff's proof, but in a secondary and corollary effort to determine under what name or in what bank the defendant deposited or secreted that which the warrant charges he embezzled in the demanding foreign jurisdiction. In this regard the plaintiff, having filed "evidence of criminality",

then seeks to misuse extradition procedure as a vehicle for prying and delving into the private bank accounts and business records of many persons and corporations, which is wholly impertinent and irrelevant to the limited function and duty of the magistrate to determine upon evidence of criminality in such special and limited proceeding.

VIII. Petitioners further say that unless this Honorable Court exercises its appellate and supervisory jurisdiction to prevent an unprecedented and improper invasion of petitioners' rights and interests in the premises, petitioners will have no remedy whatever and the damage and injury now apprehended will be imposed upon them since in extradition cases involving a fugitive from justice of a foreign country, the judge or magistrate acts under special authority conferred by treaties and Acts of Congress in that limited field only, and no appeal from his decision is given by the law [fol. 468] under the acts. See *Collins* v. *Miller*, 40 S. Ct. 347, 252 U.S. 364, 64 L.Ed. 616; *In re Kene's Extradition*, D. C. Tex. 1934, 6 F. Supp. 308; 10 Op. Atty. Gen. 501. Hence, since an extradition proceeding stands almost alone in the jurisprudence of the country in denying both parties a right of appeal from whatever may be the final judgment of the magistrate, petitioners say that the instant attempt on their part to restrain an unjust and unprecedented search and invasion into their private rights and private property by process issued by the district judge in a case in which they are not even parties and in which they have not even been subpoenaed as witnesses is the sole method afforded petitioners by the law of the land to prevent the execution of an oppressive and highly improper order of a court acting in excess of its lawful jurisdiction.

Wherefore, petitioners pray that this Honorable Court issue its writ of prohibition directing the Honorable William C. Mathes, acting as Judge of the United States District Court for the Southern District of Florida, Miami Division, to proceed no further in the extradition action hereinabove described insofar as same, or any subpoena or order therein, requires information, testimony or records of or from any party whomsoever pertaining to the private bank accounts of petitioners in The First National City

Bank of New York, or The French American Banking Corporation of New York, pending final hearing hereof, and that upon such final hearing the Court issue its writ of prohibition, permanently prohibiting such further proceedings against these petitioners as same involve or pertain to their private bank accounts in the aforenamed New York banking establishment.

In the alternative, petitioners pray that this Honorable Court will, in the exercise of its appellate and supervisory [fol. 469] jurisdiction, issue an order directing a stay and abatement of any and all further proceedings against them pending final hearing upon the appeal of which petitioners have given due notice, insofar as such further proceedings would involve, affect or reveal petitioners' private business affairs or facts or records pertaining to their private bank accounts aforesaid.

L. J. Cushman, Attorney for Pedro A. Guiterrez Alfaro and Lola T. de Guitterrez Alfaro, also known as Lola T. de Guiterrez Alfaro.

AFFIDAVIT

State of Florida,
County of Dade, ss.:

Before the undersigned authority personally appeared L. J. Cushman, who being duly sworn, upon his oath says that he is attorney for each of the petitioners above named; that he has read the averments and allegations of the foregoing motion and petition, and that same are true and correct according to affiant's best knowledge, information and belief.

.....

Sworn to and Subscribed before me this day of January, 1960.

.....

Notary Public, State of Florida at Large.

My Commission Expires:

.....

[fol. 470] CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the foregoing Motion for Leave to File Petition for Writ of Prohibition or Stay of Proceedings Pending Appeal, with Petition Attached, was furnished by (delivery) to each of the following:

Ward & Ward, DuPont Building, Miami 32, Florida, Attorneys for Plaintiff.

Smathers, Thompson & Dyer, DuPont Building, Miami 32, Florida, Attorneys for Silvio Gutierrez.

Scott, McCarthy, Preston Steel & Gilleland, 1414 First National Bank Building, Miami 32, Florida, Attorneys for Napoleon DePuoy.

Richard H. Hunt, 704 Ainsley Building, Miami 32, Florida, Attorney for Fortunato Herrara and Polinversiones, C.A.

Walters, Moore & Costanzo, 1008 Ainsley Building, Miami 32, Florida, Attorneys for Defendant.

Fowler, White, Gillen, Humkey & Trenam, 401 Industrial National Bank Building, Attorneys for The First National City Bank of New York, The French American Banking Corporation and The Royal Bank of Canada.

[fol. 471]

APPENDIX A TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

—vs.—

MARCOS PEREZ JIMINEZ, Defendant.

MOTION TO QUASH—Filed December 31, 1959

PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTTIERREZ ALFARO, also known as LOLA T. DE GUTIERREZ ALFARO, by and through their undersigned attorney, moves this court for an order quashing the subpoenas duces tecum served upon George F. Nolte, Assistant Vice-President, First National City Bank of New York, New York, requiring the production of documents, records, and other materials contained in the account or accounts of Pedro A. Gutierrez Alfaro and Lola T. de Guttierrez Alfaro, also known as Lola T. de Gutierrez Alfaro, at the foregoing bank, originally returnable before this court on Monday, December 14, 1959, at 10:00 a.m., and subsequently continued until January 4, 1960, at 10:00 a.m., by order dated December 15, 1959, and file this pleading solely for the purpose of moving to suppress or quash the subpoenas, and solely to suppress or quash those portions of the subpoenas pertaining to the account or accounts of Pedro A. Gutierrez Alfaro and Lola T. de Guttierrez Alfaro, also known as Lola T. de Gutierrez Alfaro. This motion does not constitute a general appearance by either moving party, nor a submission to the jurisdiction of this court for any purpose other than a special appearance to argue this particular motion. Grounds for the motion are as follows:

[fol. 472] 1. Neither Pedro A. Gutierrez Alfaro nor Lola T. de Guttierrez Alfaro, also known as Lola T. de Gutierrez Alfaro is a party to this proceeding. The subpoenas duces tecum referred to above attempt to require the named bank to produce the records of account which are the personal and private property of the moving parties, and to which they claim a right of privacy and privilege.

2. The subpoenas duces tecum were properly served, and were served in New York City, New York, which is outside this district at a distance of more than 100 miles therefrom.

3. This cause is an extradition proceeding and this court has no jurisdiction to obtain by subpoena power the persons and records sought to be obtained by said subpoenas duces tecum.

4. The documents, records, and other materials contained in the account or accounts of Pedro A. Gutierrez Alfaro and Lola T. de Guttierrez Alfaro, also known as Lola T. de Gutierrez Alfaro, are not material or relevant to this cause.

5. Said subpoenas duces tecum, and each of them, in so far as they pertain to these petitioners, are in the nature of a fishing expedition into the personal affairs of a person not a party to this cause.

/s/ L. J. Cushman
L. J. Cushman, Attorney for
Pedro A. Gutierrez Alfaro and Lola T. de Guttierrez, also known as Lola T. de Gutierrez Alfaro

I Hereby Certify that a copy of the foregoing Motion to Quash was delivered to: Ward & Ward, Attorneys for Plaintiff; Walters, Moore & Constanzo, Attorneys for Defendant, and Fowler, White, Gillen, Humkey & Trenam, Attorneys for the First National City Bank of New York, this 31st day of December, 1959.

/s/ L. J. Cushman

[fol. 492]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

FIRST NATIONAL CITY BANK OF NEW YORK, ET AL.,
Petitioners,

—v.—

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, Respondent.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE AND TO PARTICIPATE IN ORAL ARGUMENT AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE—Filed January 26, 1960

Malcolm R. Wilkey, Assistant Attorney General, moves the Court for leave to file the annexed brief on behalf of the United States as *amicus curiae* in the above-entitled case and for leave to present the Government's position on the oral argument of the cause.

The interest of the United States in the issues involved in this case stems from our treaty relations with other countries regarding the extradition of fugitives and the responsibility of this Government for the faithful execution of such treaties. In addition, the particular treaty involved in this case imposes upon the Government the obligation [fol. 493] of assisting the officers of Venezuela in an extradition proceeding "by every legal means" within the power of the Government (43 Stat. 1705).

Respectfully submitted,

Malcolm R. Wilkey, Assistant Attorney General,
Department of Justice, Washington 25, D.C.

[fol. 494]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

[Title omitted]

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The question as to whether a judge of a United States District Court has the power to issue a subpoena at the request of the demanding government in an extradition proceeding is not confined to the issues in this particular case, but involves as well considerations reaching the abilities of this Government to honor the stipulations of all treaties existing with friendly nations respecting the mutual exchange of fugitives. For that reason, the United States, with leave of this Honorable Court, brings the following considerations to the attention of the Court.

The Congress of the United States, exercising the undoubted right it has to use a wide discretion with respect to the means by which extradition treaties are to be executed, employed the judicial machinery to determine in the first instance whether probable cause is shown which will justify the holding of the accused ultimately to answer [fol. 495] to the charge in the foreign country. Even after the extradition judge certifies the sufficiency of the evidence to the Secretary of State, the Executive can refuse to surrender the fugitive. It is thus readily apparent that an extradition proceeding is not a trial since it decides nothing about the innocence or guilt of the accused. Rather, it is a proceeding to secure compliance with two requirements: (1) probable cause showing the commission of certain listed crimes, and (2) the identity of the person whose surrender is demanded.

When entrusting these duties to judicial officers, Congress invoked the aid of the judicial machinery with all of its attributes and powers. No rules of procedure were

prescribed, no limitations imposed. Thus, the extradition judge has a wide range of discretion. He determines all questions of practice, *In re Wadge*, 15 Fed. 864, 866 (S.D. N.Y. 1883), and his decisions are reviewable even in habeas corpus only as to jurisdiction, whether the offense charged was covered by the treaty and, by the most liberal extension, whether there was any evidence warranting finding reasonable ground to believe the accused guilty. *Fernandez* v. *Phillips*, 268 U.S. 311 (1925). Article XI of the Treaty here involved affirms this view by providing that "judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested."

Since the examining judge's powers and duties in the extradition process are concerned with the sufficiency of the evidence to show probable cause, it would be strange [fol. 496] indeed were he denied the right to issue compulsory process to bring whatever evidence he deems necessary before him for consideration. It is clear that examining magistrates in this country have long recognized and used this power, considering it a power so essential to their proper functions as would defeat their purpose and authority were it not vested in them.

That Congress assumed the subpoena power existed in extradition proceedings is apparent from the wording of 18 U.S.C. Sec. 3191, making provision for the summoning of witnesses on behalf of an indigent accused. This statute further provides that the costs incident thereto should be paid in the same manner as in the case of witnesses subpoenaed in behalf of the United States. Even in the absence of this statute, it would not be in keeping with our concept of fundamental fairness were an extradition accused deprived of the right to secure the attendance of a witness whose testimony is essential on his behalf. Similarly, to deny a sovereign nation access to the customary subpoena power of our courts to secure evidence bearing on the question of probable cause would be to deny the friendly sovereign a right always granted to the United States and to every accused, including the accused in this proceeding.

An extradition proceeding has no counterpart in our system of jurisprudence. In some respects, it is of the character of a preliminary examination before an examining or committing magistrate for the purpose of determining whether sufficient reason exists to hold the accused to answer to an indictment or information. Pur- [fol. 497] suant to the provisions of 18 U.S.C. Sec. 3041 a United States judge, unlike a state judge or magistrate, proceeds in these preliminary examinations according to the Federal Rules of Criminal Procedure, which permit subpoenas to be served anywhere in the United States. This demonstrates that the subpoena power is part of the judicial machinery which Congress has authorized to be used in extradition proceedings, for the Federal Rules do not confer substantive powers but merely set out the procedures for the utilization of these powers. The subpoenas here are signed by a United States District Judge; there is no foundation for a claim that a Federal judge has less power in an extradition proceeding than he has when he acts as a committing magistrate. As has been said, Congress did not place the extradition judge in a strait-jacket. Rather, he was given full powers, within constitutional limits, to control the procedures in extradition proceedings.

The United States is concerned here that the United States District judge have the necessary power properly to discharge the responsibility which is his in extradition proceedings. The standards of proof, of due process of law, and of all constitutional and procedural safeguards which he applies are the standards of the United States, not of the foreign demanding country. Article I of the Extradition Treaty of January 19, 1922, between the United States and Venezuela provides:

> Such surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be [fol. 498] found, would justify his detention and commitment for trial if the crime or offense had been committed there (43 Stat. 1698).

It would, the United States submits, be inconsistent with the judge's responsibility and this provision of the treaty to deny the judge access to all relevant information available within the United States. It would likewise be inconsistent with all other forms of judicial procedure to grant the existence of the judge's subpoena power on behalf of an indigent accused (18 U.S.C. 3191), or on behalf of any accused, and to deny the existence of a subpoena power on behalf of a friendly foreign sovereign desiring to bring relevant information before the judge to aid him in the discharge of his responsibility.

The United States suggests that, should this Honorable Court conclude that the District Judge in this case is empowered to issue compulsory process, such a conclusion would not adversely affect the rights of these appellants, and furthermore would enable the United States to expect reciprocally a liberal construction of local laws when demanding the return of fugitives from distant lands to this country.

Respectfully submitted,

Malcolm R. Wilkey, Assistant Attorney General,
Robert S. Erdahl, Harold P. Shapiro, Joseph J. Cella, Jr., Attorneys, Department of Justice.

January 1960.

[fol. 597]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH-AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

[fol. 598]

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEQUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

NAPOLEON DUPOUY, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO, Petitioners,

versus

[fol. 599]

MANUEL ARISTEGUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

Appeal from the United States District Court for the Southern District of Florida and Motions for Leave to File Petitions for Writs of Prohibition or Mandamus.

ORDER—January 29, 1960

Before Rives, Chief Judge, and Hutcheson and Jones, Circuit Judges.

Per Curiam: The appeal of the First National Bank of New York, the French American Banking Corporation, and the Royal Bank of Canada from an order denying a motion to quash three subpoenas duces tecum, issued on behalf of the demanding country in the extradition proceedings first hereinabove styled, and the motions for leave to file petitions for writ of prohibition or mandamus in all the other captioned causes, were argued and heard together. It was stipulated upon oral argument that final judgment might be entered as if leave to file the petitions for writ of prohibition or mandamus had been granted and those cases had been heard on the merits.

The court has carefully read and considered the briefs together with the oral arguments and has reached a conclusion. In view of the need for expedition, that conclusion is announced without opinion.

[fol. 600] The court decides that the order denying motions to quash the subpoenas duces tecum is final and appealable. A majority of the court concludes that the said order should be reversed and the cause remanded with directions to quash the subpoenas duces tecum.

In view of the conclusions above announced, the petitions for the writ of prohibition or mandamus are denied.

The clerk is directed to enter judgments accordingly. Judge Rives thinks that the order should be affirmed, and, therefore, respectfully dissents.

[fol. 601]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

NAPOLEON DUPOUY, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

Appeal from the United States District Court for the Southern District of Florida and Motions for Leave to File Petitions for Writs of Prohibition or Mandamus.

Before Rives, Chief Judge, and Hutcheson and Jones, Circuit Judges.

JUDGMENT—January 29, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court denying the motions to quash the subpoenas duces tecum in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to quash the subpoenas duces tecum; and that the petitions for writ of prohibition or mandamus are denied.

It is further ordered and adjudged that the appellants, The First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada recover their taxable costs in this Court from the appellee, Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

"Rives, Chief Judge, Dissenting."

January 29, 1960

[fol. 602]

[File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

FORTUNATO HERRERA and POLINVERSIONES, C.A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

MOTION OF APPELLEE MANUEL ARISTEQUIETA FOR CLARIFICATION OF ORDER FILED—February 1, 1960

It is requested that this Court clarify the basis of its order of January 29, 1960, reversing the orders appealed from.

The appellants argued, in this Court two propositions:

(a) A district court has no power to compel the attendance of witnesses and production of documents in aid of an extradition proceeding, nor does an extradition judge have any such power except in the cas of indigent defendants.

(b) In any event, the process of the district court or the district judge cannot run outside of the district for more than 100 miles from the place of hearing.

[fol. 603] Adoption of either proposition by this Court leads to reversal of the orders of the lower court.

If this Court based its decision solely on proposition (b), that leaves it open to the parties to proceed by deposition in New York under the Civil Rules as the appellee had originally attempted to do.

If this Court based its decision on (or also on) proposition (a), the proceeding below will take a quite different course.

It is most important that the parties and the lower court be advised of the basis of this Court's decision in order to promote expedition in the proceeding and to avoid the possibility of considerable expense being incurred under a misapprehension.

Clarification of the matter is also most pertinent to the question whether a petition for a writ of certiorari should be filed in the Supreme Court.

Respectfully submitted,

Howard C. Westwood, Covington & Burling, 701 Union Trust Building, Washington 5, D. C., Attorney for Appellee, Manuel Aristeguieta.

January 30, 1960

[fol. 604] Certificate of service (omitted in printing).

[fol. 612]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

NAPOLEON DUPOUY, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

ORDER DENYING MOTION FOR CLARIFICATION OF ORDER—February 4, 1960

Before Rives, Chief Judge, and Hutcheson and Jones, Circuit Judges.

Per Curiam:

The Motion for Clarification of the Order entered on January 29, 1960, is hereby denied.

February 4, 1960.

[fol. 613]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18,176

THE FIRST NATIONAL CITY BANK OF NEW YORK, THE FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Appellants,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of The Republic of Venezuela, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

ORDER TRANSMITTING RECORD, SUPPLEMENTAL RECORD AND ORIGINAL PAPERS NEEDED TO COMPLETE THE RECORD TO THE SUPREME COURT OF THE UNITED STATES—February 17, 1960

Order:

It Is Ordered that the Clerk be, and he is hereby authorized to transmit to the Supreme Court of the United States, the certified transcript of record and supplemental record, together with any other original paper or papers needed to complete the record for filing in that Court, in connection with an application for writ of certiorari in the above entitled and numbered cause.

Richard T. Rives, U. S. Circuit Judge.

February 17th, 1960.

[fol. 614] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 653]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

NAPOLEON DUPOUY, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

On Motion to Dismiss the Appeals of Fortunato Herrera, Polinversiones, C.A. (a Venezuelan corporation), Silvio Gutierrez, Napoleon Dupouy, Pedro A. Gutierrez Alfaro and Lola T. de Gutierrez Alfaro.

Before Rives, Chief Judge, and Hutcheson and Jones, Circuit Judges.

PER CURIAM ORDER OF JUDGE RIVES DENYING MOTION TO DISMISS—Filed March 28, 1960

This Court intended to and did decide on January 29, 1960, all five appeals pending in this cause; that is, the joint appeal by the First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada, the appeal of Silvio Gutierrez, the appeal of Napoleon Dupouy, the appeal of Fortunato Herrera and Polinversiones, C.A., and the appeal of Pedro A. Gutierrez Alfaro and Lola T. de Gutierrez Alfaro. The Clerk is directed to issue a supplementary mandate so indicating. Since the appeals are no longer before this Court, the motion of Fortunato Herrera and Polinversiones, C.A. (a Venezuelan corporation), Silvio Gutierrez, Napoleon Dupouy, Pedro A. Gutierrez Alfaro and Lola T. de Gutierrez Alfaro to dismiss the appeal is Denied.

Enter for the Court this the 25th day of March, 1960.

Richard T. Rives, Chief Judge, Fifth Circuit.

[fol. 654]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Plaintiff,

versus

MARCOS PEREZ JIMENEZ, Defendant.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, Petitioners,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

SILVIO GUTIERREZ, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

NAPOLEON DUPOUY, Petitioner,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO, Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, Respondent.

Appeal from the United States District Court for the Southern District of Florida —and— Motions for Leave to File Petitions for Writs of Prohibition or mandamus.

Before Rives, Chief Judge, and Hutcheson and Jones, Circuit Judges.

AMENDED JUDGMENT—Filed March 28, 1960

It Is Ordered that the judgment of this Court entered on January 29, 1960 and issued on March 3, 1960 as and for a mandate be, and the same is hereby amended to read as follows:

This cause came on to be heard on all five appeals pending in this cause; that is, the joint appeal by the First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada, the appeal of Silvio Gutierrez, the appeal of Napoleon Dupouy, the appeal of Fortunato Herrera and Polinversiones, C.A., and the appeal of Pedro A. [fol. 655] Gutierrez Alfaro and Lola T. de Gutierrez Alfaro, and on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court denying the motions to quash the subpoenas duces tecum in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to quash the subpoenas duces tecum; and that the petitions for writ of prohibition or mandamus are denied.

It is further ordered and adjudged that the appellants, The First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada recover their taxable costs in this Court from the appellee, Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

"Rives, Chief Judge, Dissenting."

March 25, 1960

[fol. 656]

SUPREME COURT OF THE UNITED STATES

No. 77—October Term, 1960

MANUEL ARISTEGUIETA, ETC., Petitioner,

vs.

FIRST NATIONAL CITY BANK OF NEW YORK ET AL.

ORDER ALLOWING CERTIORARI—March 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 688 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

OCTOBER TERM, 19[redacted]63

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 1960

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Supreme Court of the United States

OCTOBER TERM, 1959

No.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on January 29, 1960. That judgment reversed an order* of the United States District Court for the Southern District of Florida, Miami Division, denying motions to quash

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* As the statement will show at pp. 7-8, *infra*, two orders of the District Court are involved.

subpoenas duces tecum in an international extradition case. The Court of Appeals remanded the case to the District Court with directions to quash the subpoenas duces tecum. Petitioner further prays this Court to reverse the judgment of the Court of Appeals.

THE JUDGMENT AND OPINION BELOW

The orders of the District Court involved in this proceeding are those of November 25, 1959, December 15, 1959 and January 4, 1960, set out in Appendix 2. These orders are not reported.

The per curiam opinion and judgment of the Court of Appeals are set out in Appendix 3, pp. 3-7. The per curiam opinion of the court is reported under date of February 1, 1960, at 274 F. 2d 206.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In an extradition proceeding pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. § 3184 has a United States District Judge conducting the proceeding, or the United States District Court in which he sits, the power to issue a subpoena duces tecum in aid of the proceeding?

2. Is the service of a subpoena duces tecum in an extradition proceeding, particularly a subpoena which

does not require the attendance of a witness at court, limited to service only within the district or, if without the district, only within 100 miles of the place of the hearing?

3. Does a bank depositor have any privilege or other legally protected interest in a bank's records of his account which may defeat a subpoena requiring the bank to produce such records in an extradition proceeding to which the depositor is not a party?

STATEMENT

This petition stems from an international extradition proceeding before the Honorable William C. Mathes, United States District Judge, sitting by special assignment in the United States District Court for the Southern District of Florida, Miami Division. That proceeding was initiated by the filing of a complaint on August 24, 1959, by this petitioner pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and the extradition statute, 18 U.S.C. § 3184, against Marcos Perez Jimenez, a citizen of Venezuela who has been formally charged in the original jurisdiction of the highest court of that country with a variety of financial crimes and with complicity in four specified murders. On the same day as the filing of the complaint in the United States District Court a warrant of arrest was issued by that court, served on the defendant the next day, and the defendant was admitted to bail.

A formal request for extradition, with supporting documents, was lodged with the Department of State by the Ambassador of Venezuela, and subsequently filed in the District Court in Miami. These supporting documents include the charges preferred against the

defendant by the Attorney General of Venezuela in the Federal Court of that country, the finding of that court that the charges and evidence establish cause for prosecution and arrest, the warrant of arrest, and a substantial quantity of the evidence presented to the Federal Court.

The complaint in the extradition proceeding, amended since the original filing on August 24, 1959, charges the defendant with complicity in several murders and with serious and large-scale financial crimes amounting to an ambitious program of wholesale theft of public funds, all in violation of specified provisions of the Penal Code of Venezuela (R. 74-75, 113-92, 222-32, 247-52). These crimes occurred during the period 1948-1958, when the defendant was a member of the Government Junta of Venezuela and, later, President of the Republic, exercising in those capacities the ultimate power over public finances, as over most other matters in which the government of Venezuela was concerned. He was removed from power and fled the country in January, 1958.

Article II of the Extradition Treaty with Venezuela, 43 Stat. 1699, specifies crimes for which extradition shall be made under the Treaty, including the crimes of murder, embezzlement or criminal malversation by public officers, fraud, breach of trust, receipt of money knowing the same to be unlawfully obtained, and participation as an accessory in any of these crimes. The charges against the defendant in Venezuela and in the District Court in Miami fall within these treaty crimes.

Documentary evidence submitted to the Federal Court in Venezuela, presented to the Department of

State and filed as part of the formal extradition papers in the District Court, disclosed that defendant's program of illegal enrichment was carried out with the assistance and connivance of his close associates during his tenure of public office, and through the facilities of banks in the United States, among others (R. 170-252). Accordingly, this petitioner, the plaintiff in the extradition case, served notices for the depositions of officers of two of these banks—The First National City Bank of New York and French American Banking Corporation (R. 65-69). The notices were duly presented to the clerk of the United States District Court for the Southern District of New York, who issued subpoenas to these officials to appear for oral depositions within that district and to bring with them specified records of transactions of their banks with defendant and certain of his associates. (Those subpoenas do not appear in the record before this Court, since they did not appear in the record of proceedings before Judge Mathes.)

On November 12, 1959, defendant moved in the District Court in Miami for a protective order pursuant to Rule 30(b) of the Civil Rules, contending that the deposition notice failed to comply with Rule 15 of the Federal Rules of Criminal Procedure (R. 70). The motion was heard before Judge Choate, in the absence of Judge Mathes. Judge Choate issued an order on November 13 vacating the deposition notice and subpoena and providing that the Civil Rules should not govern the proceeding, but that procedure should be pursuant to the Criminal Rules, "as they may apply" (Appendix 2, p. 1). This order was superseded and vacated by a second order of Judge Choate of November 23, 1959, providing that

"the procedure is to be governed as stated in the Treaty" and that "the court is of the opinion that the right of subpoena exists as relates to witnesses and further that the court may, by order, provide for the securing of testimony where a witness cannot be secured to appear before the court." (Appendix 2, p. 2).

On the same date the extradition proceeding resumed before Judge Mathes and a thorough discussion ensued between counsel and the judge as to the appropriate method of compelling the production of the bank records (R. 83-88). In conformity with the procedure outlined by counsel and approved by Judge Mathes, this petitioner submitted a motion, with supporting affidavit of counsel, for orders in the nature of subpoenas duces tecum (R. 5-8). The proposed orders were signed by Judge Mathes on November 25, 1959, and required the officials of five banks to produce specified bank records (Appendix 2, pp. 3-21).* (The schedules specifying the particular records were substantially the same as those attached to the earlier subpoenas vacated by Judge Choate.) The orders contained carefully drawn protective provisions that had been discussed before Judge Mathes: first, that the witnesses need not actually appear in court, if prior to the return date counsel for the parties were permitted to examine the records and make such copies as they wished; second, that counsel should make no disclosure, without further order of the court, of any of the bank records (relating to persons other than defendant and his family) to anyone other than the plaintiff (meaning the Consul General personally)

* Only those four subpoenas that were involved in proceedings before the Court of Appeals appear in Appendix 2.

and the defendant, except as necessary in preparing or offering the documents as evidence.

These subpoenas were turned over to the U. S. Marshal in Miami for service in the manner provided for subpoenas under the Federal Rules of Criminal Procedure, and service was duly made upon the named officials of The Hibernia National Bank in New Orleans, the Chemical Bank New York Trust Company, The First National City Bank of New York, French American Banking Corporation, and the New York branch of The Royal Bank of Canada. All but the first of these are situated in New York.

The three banks that are respondents here moved jointly to quash the subpoenas directed to them, and their motion (R. 9) was heard before Judge Mathes on the original return date, December 14, 1959. Also heard on that date were motions to quash filed by two depositors: Silvio Gutierrez, a depositor in the Chemical Bank New York Trust Company, and Napoleon Dupouy, a depositor in The First National City Bank of New York and French American Banking Corporation (R. 394, 439). Records of the accounts of these depositors were among the records described in the subpoenas.

In the course of the December 14 hearing the questions of the applicability of the civil or criminal rules in the court's discretion and of the court's subpoena power under the Treaty, the extradition statute, and the all-writs statute (28 U.S.C. § 1651) were explored at length, as well as means of further reducing any burden that might be claimed by the banks. In an order entered the next day, December 15, 1959, Judge Mathes denied the motions to quash, but

modified the subpoenas of November 25 so as to incorporate certain protective considerations that were discussed at the hearing: (a) the return date was extended to January 4, 1960, (b) no records of transactions of less than $1,000 were to be produced, (c) this petitioner was required to reimburse the banks for any unusual expenses incurred in response, (d) the time span of records required by the subpoena was reduced to eliminate records subsequent to June 30, 1958 (Appendix 2, p. 25). Subsequently, the return date was extended to January 27, 1960 (Appendix 2, p. 28).

After December 15 additional depositors moved to quash, namely, Fortunato Herrera and Polinversiones, C.A. (not specifying the banks in which they were depositors) and Pedro A. Gutierrez Alfaro and his wife, Lola T. de Gutierrez Alfaro, depositors in The First National City Bank of New York (R. 363, 471). After hearing on January 4 their motions were denied by order of the same date (Appendix 2, p. 27).

Notices of appeal were filed by all movants, *i.e.*, the three banks and the six depositors. (R. 31, 374, 418, 482).

Meanwhile, The Hibernia National Bank voluntarily sent copies of their records to counsel and that bank was not involved in subsequent proceedings in the Court of Appeals.

The three banks and the six depositors then filed petitions in the Court of Appeals for leave to petition for a writ of prohibition or mandamus (with petitions attached) (R. 297, 357, 385, 427, and 465). On January 20, 1960, the Court of Appeals ordered a stay

of the subpoena proceedings pending the disposition of the appeals and petitions (Appendix 3, p. 2). The banks' joint petition urged that there is no power of subpoena in a District Court or a District Judge on behalf of the demanding country in an extradition proceeding and that, in any case, the District Court has no power to issue a subpoena for service on a witness outside the district and not within 100 miles of the place of hearing (R. 299). These points were also asserted by the depositors.

Oral argument was had before Chief Judge Rives and Judges Hutcheson and Jones on January 27. Owing to the shortness of time, a typed record was transmitted to the Court of Appeals. The United States filed a brief (R. 492) and appeared as amicus curiae, through Assistant Attorney General Malcolm Wilkey, in support of this petitioner's position with respect to the power of subpoena in an extradition case.

The court below decided the appeals in favor of the banks and depositors. Its decision of January 29 reversed the District Court's order denying motions to quash, Chief Judge Rives dissenting (Appendix 3, p. 3). It is that decision which this Court is asked to review and reverse.

The mandate of the Court of Appeals was transmitted to the District Court in Miami on March 3, 1960. Proceedings in the extradition case resumed before Judge Mathes on March 7, and on March 9 he entered an order quashing the subpoenas on the three banks that are respondents here, in accordance with the mandate of the Court of Appeals (Appendix 2, p. 34). On March 25 the Court of Appeals amended its judgment (Appendix 3, pp. 11-12) to make it clear

that it intended also to order the subpoena on the Chemical Bank quashed, and Judge Mathes quashed that subpoena by order of April 7.

Meanwhile, on motion of this petitioner, Judge Mathes entered another order on March 9 permitting petitioner to take the depositions of officials of the three respondent banks, in accordance with the practice outlined in Rules 26 and 45 of the Federal Rules of Civil Procedure, subpoenas to be issued by the United States District Court for the Southern District of New York, where the banks are situated (Appendix 2, p. 31). The banks, regarding that order of March 9 as contrary to the mandate of the Court of Appeals, petitioned that court for leave to file a petition for a writ of prohibition or mandamus to vacate the order. On March 25 the Court of Appeals denied the petition for leave to file, stating that Judge Mathes' order of March 9 was not before it for decision in the earlier case and not contrary to the mandate (Appendix 3, p. 15). This action of the Court of Appeals is explicable on the ground that Judge Mathes' order to proceed with depositions was not itself a subpoena and that the question of the power to issue a subpoena in extradition would only arise when subpoenas were issued by the United States District Court for the Southern District of New York and should be litigated there and in the Second Circuit.

On March 15, 1960, deposition notices were served upon officials of the three respondent banks, with subpoenas issued by the United States District Court for the Southern District of New York. A joint motion to quash was filed by the banks on the same grounds as those urged in the Fifth Circuit and, on application of Napoleon Dupouy, an order was issued to show

cause why the subpoenas should not be quashed, both assigned for hearing before Chief Judge Ryan on April 14. After partial argument the hearing was adjourned, the depositions were continued until May 10, and Chief Judge Ryan ordered the matter submitted on briefs by April 29. In addition, a deposition notice has been served on the Chemical Bank, with a subpoena issued by the District Court in New York. The defendant in the extradition case and respondent Gutierrez Alfaro sought protective orders from Judge Mathes to prevent the taking of the depositions. Their motions have been denied, and defendant has filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit. Thus, it may be expected that further litigation over the subpoena power in extradition will come to this Court through the Fifth and Second Circuits in the near future.

The original record in the proceedings below has been transmitted to this Court.*

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* The clerk of the Court of Appeals, in preparing the original record for certification, consecutively paginated the first two volumes by a numbering machine and transmitted them to this Court. Subsequently he prepared a Supplemental Record and a Second Supplemental Record, each of which he paginated separately, beginning with page 1. With the permission of the office of the clerk of this Court, petitioner's counsel has paginated the Supplemental Record and Second Supplemental Record by machine so as to continue the consecutive pagination of the first two volumes. All record references contained in this petition are to the consecutive machine pagination.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important and novel federal question which will have a far-reaching effect on the conduct of extradition cases in the federal courts. The court below has placed a serious restriction on the administration of 18 U.S.C. § 3184, which in this case will, and in future extradition cases may, confine the efficacy of the extradition treaty obligation.

Below we state five reasons, falling within the criteria of importance which this Court has laid down, warranting the issuance of its writ to review the judgment of the lower court. But there is one other reason so unusual, yet so obvious, that unless mentioned it could be overlooked in the details of the problems involved here.

In this proceeding a sovereign republic of this hemisphere has asked the assistance of the United States government in effecting the extradition of a former president of that republic charged with the most serious crimes. The Venezuelan government has proceeded in court through its Consul General under its treaty with the United States, and has also asked the United States for the aid of its legal officers. The Government of the United States, loyal to a treaty obligation, has responded appropriately by supporting the position of the Venezuelan government in the Court of Appeals through an Assistant Attorney General of the United States, and thereby supporting the judicial power necessary to the performance of the nation's treaty obligation. The Court of Appeals refused to sustain the exercise of judicial power below, and decided against the position of the two governments, without any statement of its reasons. Surely

an issue of this importance, concurred in by both governments, parties to a treaty, decided in a case of the highest moment, and decided adversely to both governments, warrants the attention and review of our highest court. Indeed, similar considerations of the gravity of the interests of a sovereign government led to the framing of the original jurisdiction of this Court as provided in Article III, Section 2, of the Constitution of the United States (*The Federalist*, No. 80 (Hamilton)), and should provide in this case a weighty reason for review.

There are five additional reasons why it is important that this Court grant its writ and clarify the power of the District Court or District Judge in extradition to compel evidence.

First, the United States is a party to sixty-five bilateral treaties of extradition and a multilateral convention on extradition (to which ten other nations are parties), in virtually all of which treaties appear provisions more or less similar to the provision of Article I of the Venezuelan Treaty which, together with 18 U.S.C. § 3184, requires a hearing of evidence of guilt before a judicial officer. See Note to Title 18 U.S.C. § 3181 (1958 ed.). The question of judicial power to compel the production of evidence that is found in the United States may arise under any of these treaties. Whether such judicial power exists may determine whether the demanding nation's treaty right shall be effectively enforced. If the Court of Appeals' decision stands, the United States, far from closing its doors to fugitive criminals from abroad as these treaties contemplate, may well become a haven for such criminals and a notorious place of concealment of evidence of their crimes.

Second, to deny power to the extradition judge or the District Court to issue subpoenas or to serve them wherever in the United States may be necessary places a significant limitation upon the scope of the all-writs statute, 28 U.S.C. § 1651, and upon this Court's decision in *American Lithographic Company* v. *Werckmeister,* 221 U.S. 603, which held that a subpoena is broadly authorized by that statute. The applicability of 28 U.S.C. § 1651 and the *Werckmeister* decision to the subpoena power in extradition proceedings should be definitively settled by this Court.

Third, the decision below appears to conflict with accepted practice in extradition proceedings by which the demanding country may and does offer evidence in addition to that on which the original warrant of arrest was based. Respondents urged below that such evidence is not available to the demanding country, but that the evidence is confined to that "upon which the accusation [presumably in the demanding country] is based" (R. 530). While one cannot tell from the per curiam statement of the Court of Appeals how completely this argument was accepted, the point clearly was a possible basis of decision. On the contrary, accepted practice has permitted evidence obtained in this country after arrest to be offered at the hearing, and examples of such evidence appear in the records of extradition cases that have come to this Court. See, *e.g.,* Record, pp. 20-26 (30-41 in original) in *Bingham* v. *Bradley,* 241 U.S. 511; Record, pp. 15-28 (31-54 in original) in *McNamara* v. *Henkel,* 226 U.S. 520.

Fourth, the decision below is inconsistent also with that liberal construction of treaty provisions which this Court has enjoined upon the judiciary in *Factor* v. *Laubenheimer,* 290 U.S. 276. In that thoroughly

considered decision the Court emphasized that the extradition treaty provisions there involved should be construed to give liberal effect to the purpose of the treaty, to wit, the surrender of fugitives duly charged with crime:

> "The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure." 290 U.S. 276, 298.

Article XI of the Venezuelan Extradition Treaty provides that: "The judicial functionaries . . . shall prescribe the method of complying with the legal formalities of the country from which the extradition is requested." 43 Stat. 1704. We believe that, liberally interpreted, this provision of the Treaty authorizes the extradition judge to select a reasonable form and method of subpoena, free of the restrictions of the rules governing other types of cases. This Court should require the Court of Appeals to adhere to the principle of liberal construction of treaties.

Fifth, if the Court of Appeals decided that the depositors have a valid ground to quash the subpoenas because of a property interest in the bank records, its decision would conflict with prior decisions of other courts of appeals holding that depositors have no property interest in a bank's records of their accounts. *Foster* v. *United States*, 265 F.2d 183 (2d Cir. 1959), *certiorari denied*, 360 U.S. 912; *Zimmermann* v. *Wilson*, 105 F.2d 583 (3d Cir. 1939); *United States* v. *Peoples Deposit Bank & Trust Co.*, 112 F. Supp. 720 (E.D. Ky. 1953), *affirmed*, 212 F.2d 86 (6th Cir. 1954) (adopting opinion of District Court),

certiorari denied, 348 U.S. 838; *McMann* v. *Securities and Exchange Commission*, 87 F.2d 377 (2d Cir. 1937), *certiorari denied*, 301 U.S. 684. If, as is the other possibility, a supposed depositor's privilege were the basis of decision, that would equally conflict with the decisions of the Fifth Circuit itself and decisions of other courts of appeals. *Bowles* v. *Shawano Nat. Bank*, 151 F.2d 749 (7th Cir. 1945), *certiorari denied*, 327 U.S. 781; *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D.D.C. 1953), *affirmed with modification sub nom. Societe Internationale* v. *Brownell*, 225 F.2d 532 (D.C. Cir. 1954), *certiorari denied*, 350 U.S. 937; *McMann* v. *SEC*, *supra*; *Falsone* v. *United States*, 205 F.2d 734 (5th Cir. 1953), *certiorari denied*, 346 U.S. 864. This Court should resolve the conflict.

REASONS FOR SUMMARY REVERSAL

In urging this Court to grant the writ and reverse the judgment of the Court of Appeals on the papers now before it, we do not suggest that the need for an expeditious decision from this Court warrants skimping the time for full and careful consideration. But we do urge that neither the existence of power to compel evidence in this extradition proceeding nor the propriety of its exercise by the judge here presiding is a question tnat calls for extended argument or study, while a matter of great public importance does call for "all deliberate speed" by this Court in making its decision.

Regardless of the importance of the evidence sought by the subpoenas here at issue and those involved in the deposition proceedings now pending, doubt about the power to issue a subpoena will continue to haunt the proceedings, including the defense, until the

question is settled. And this will occur in an extradition proceeding commonly regarded throughout Latin America as a test of the good faith of the United States.

For some years the relations of this country with the Latin American countries have been the cause of increasing concern. Most observers have concluded that the presence here of the deposed dictator of Venezuela, Perez Jimenez, was an important cause of the popular resentment in Venezuela and elsewhere in the hemisphere, where it was widely interpreted as American support of dictatorial governments, of which there had been complaints over many years.

The commencement of the extradition case by this petitioner against Perez Jimenez has been carefully and hopefully watched as a possible turning point in the recognition here of the democratic aspirations of the American republics. These developments are briefly traced in Appendix 4 hereto, consisting of reports and public statements of qualified observers and officials.

For this reason it is important that issues arising from the extradition case be decided as promptly as the requirements of justice permit.

The reasons for reversal are developed in the argument that follows.

SUMMARY OF ARGUMENT

A district judge conducting an extradition proceeding pursuant to the Extradition Treaty with Venezuela and the extradition statute is charged with a responsibility and a function that are judicial in nature. The case requires the type of determination

that is characteristic of judicial responsibility and of the exercise of judicial powers. The proceeding has adverse litigants and genuine adverse interests between the parties. It involves legal and factual issues peculiarly suited to judicial determination and susceptible of finality of judgment. Whether the extradition case involves judicial power in the strict sense of Article III of the Constitution is unimportant. Article I of the Treaty and 18 U.S.C. § 3184 create a function, judicial in nature, to be performed, as it properly may be, by a statutory tribunal consisting (in this case) of a federal judge. See *Williams* v. *United States*, 289 U.S. 553.

Since the judge hearing the extradition proceeding acts, in substance, as a statutory court, he is within the purview of the all-writs act, 28 U.S.C. § 1651, amended in 1948 to confer its authority upon statutory, as well as constitutional, tribunals. This statute, providing that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," includes the authority to issue a subpoena duces tecum. *American Lithographic Co.* v. *Werckmeister, supra; Kamen Soap Products Co.* v. *United States*, 110 F. Supp. 430 (Ct. Cl. 1953); *Bethlehem Shipbuilding Corporation* v. *National Labor Relations Board*, 120 F.2d 126 (1st Cir. 1941). And if the powers of the judge should not include the power to issue compulsory process, the power of the District Court in which he sits would extend to the proceedings for, at least, ancillary purposes, enabling the court to act in aid of the proceeding. *The United States, Petitioner*, 194 U.S. 194; *United States* v. *Tom Wah*, 160 Fed. 207

(N.D.N.Y. 1908), *affirmed*, 163 Fed. 1008 (2d Cir. 1908). This power of the court may be invoked to issue a subpoena, and, indeed, the subpoenas involved here could have been, and possibly were, issued by the court itself.

Article I of the Extradition Treaty with Venezuela, which defines the governing standard of sufficiency of evidence, emphasizes the practical necessity for the subpoena power. And Article XI of the Treaty, which provides that "the judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested," merits a liberal interpretation to carry out the purpose of the Treaty and to give effect to Article I. *Factor* v. *Laubenheimer, supra.* So construed, Article XI provides the extradition judge with sufficient latitude to fashion the method and form of a subpoena to suit the needs of the individual case.

The extradition statute, 18 U.S.C. § 3191, presupposes that the subpoena power is available to both parties.

The exercise of subpoena power by the extradition judge is not limited to service within 100 miles, since the judge is not confined to the particular provisions of the Federal Rules of Civil Procedure containing the 100-mile limitation. A subpoena issued pursuant to the independent authority of 28 U.S.C. § 1651 is not subject to the conditions fixed by another statute or set of rules, *American Lithographic Co.* v. *Werckmeister, supra; Kamen Soap Products Co.* v. *United States, supra,* just as a subpoena may be issued under Section 1651 in the absence of *any* rule or statute pro-

viding for subpoenas. *Bethlehem Shipbuilding Corp.* v. *NLRB, supra.* Outside of the Civil Rules no general policy of judicial administration is apparent which should limit a subpoena to service within 100 miles of the place of hearing. On the contrary, a policy permitting service at any place within the United States may be inferred from the provisions of Rule 17, Federal Rules of Criminal Procedure. In any case, the subpoenas involved here do not require the attendance of witnesses at the hearing, within the terms of Civil Rule 45(e)(1). Moreover, neither the discretion given to the extradition judge under Article XI of the Treaty with Venezuela, nor the subpoena power contemplated by the extradition statute, 18 U.S.C. § 3191, provides or implies a geographical limitation upon service.

The orders of the District Court as to the depositors should be affirmed in any case, since a bank depositor does not have any property interest or any privilege with respect to a bank's records of his accounts, and consequently no interest or standing to assert as basis of a motion to quash a subpoena directed to the bank.

ARGUMENT

I

THE EXTRADITION JUDGE, OR THE COURT IN WHICH HE SITS, HAS THE POWER TO ISSUE A SUBPOENA

A. THE FUNCTION OF THE EXTRADITION JUDGE IS JUDICIAL IN NATURE.

It is important to analyze, at the outset, the judicial nature of the responsibility of the extradition judge and of the determination he must make under 18 U.S.C. § 3184. The purpose of such an analysis is not to demonstrate that the proceeding is one within the strict scope of Article III of the Constitution—it is

not necessary that it be. Rather, our purpose is to show that the extradition judge has a special judicial responsibility by statute, and hence must be accorded the powers of a statutory tribunal, including the subpoena power. It is settled that Congress, in the exercise of its legislative power, may create special statutory tribunals to make determinations of a judicial character and that these powers are not derived from or confined to the specifications of Article III. *Williams* v. *United States, supra;* see *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582. Therefore we need not be concerned with the constitutional status of the proceedings that Congress has authorized for extradition. It is enough that they are judicial in character, for reasons that we now discuss.

The extradition judge's duty is defined by 18 U.S.C. § 3184. That section, the full text of which appears in Appendix 1, provides that the accused

> ". . . may be brought before such . . . judge . . . to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

That these provisions require a proceeding of a judicial nature is apparent from the presence in

extradition of the familiar criteria of a case or controversy. First, the proceeding is between adverse litigants. The proceeding is initiated by the filing of a complaint, by which the plaintiff charges the defendant with specified crimes. Both parties are represented by counsel. The hearings take place in open court, with a transcript of proceedings. All papers are filed with the clerk.

Second, there can be no doubt that between these adverse litigants there are real and substantial adverse interests. The interest of the plaintiff is in securing the judge's warrant committing the defendant to jail to await surrender. The interest of the defendant is in securing his liberty by defeating the charges advanced in the complaint, and this involves either disputing plaintiff's evidence or raising legal objections based upon the treaty or statute.

Third, the questions involved in the litigation of these adverse interests are questions of fact and law, types of questions that courts determine and that lend themselves to determination by courts. The issue before the judge is whether the defendant is extraditable. The resolution of this issue requires an examination and evaluation of evidence, and a determination whether probable cause is made out. See *Charlton* v. *Kelly*, 229 U.S. 447; *Benson* v. *McMahon*, 127 U.S. 457. In addition to a factual determination, legal issues must be disposed of—whether a given treaty or convention applies, whether the charges are within the crimes specified in the treaty, whether a statute of limitations applies and has run or has been tolled, and whether the numerous procedural requirements of extradition have been satisfied. These

questions are characteristically the material of judicial determination.

Fourth, the judge's determination of the issues submitted to him is as final as the resolution of many litigations that are unquestionably judicial in nature. The question submitted to the judge under 18 U.S.C. § 3184 is *not* whether the defendant shall be surrendered to the demanding government. The question that the judge decides is whether the defendant shall be committed to await the action of the Secretary of State, or to put it another way, whether the Secretary *may* surrender the defendant. If "the evidence [is] sufficient to sustain the charge under the provisions of the proper treaty or convention . . ." the judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender [to the demanding government] is made." 18 U.S.C. § 3184. On the question of commitment the judge's determination is conclusive upon the Secretary of State. As Secretary Root stated in a letter to Governor Campbell in 1908,

> "As you are aware, it is necessary in extradition cases that a judicial hearing should be held before a competent extradition magistrate, and that the latter should issue his commitment for the surrender of the fugitive, before final action can properly be taken by this Department." IV Hackworth, *Digest of International Law*, p. 116.

Attorney General Nelson advised Secretary of State Upshur to the same effect even prior to the enactment of the 1848 extradition statute, when extradition was governed by treaty provisions alone: "Beyond this judgment I do not think it is the duty or province of the President to look. It is conclusive." 4 Ops.

Att'y Gen. 201, 205 (1843). Thus, the judge's ruling in favor of the defendant is final, at least for the particular case, for it bars his surrender by the Secretary of State.

The judge's decision is no less final when it is against the defendant. This determination is final, for it is executed by the judge's warrant committing the accused to jail. See *Collins* v. *Loisel*, 262 U.S. 426; *In re Kaine*, 14 How. 103; Cyclopedia of Federal Procedure, § 40.201. Of course, the Secretary of State may, for political, diplomatic or other reasons, decline to surrender the defendant to the demanding government. Hackworth, *supra*, § 338. But in making his decision he is not reviewing or revising the judge's determination, for the judge's warrant has been executed before the Secretary of State acts.*

B. THE EXTRADITION JUDGE HAS A POWER OF SUBPOENA UNDER 28 U.S.C. § 1651.

For the reasons stated in the foregoing subsection we believe that 18 U.S.C. § 3184 constitutes the extradition judge a special legislative tribunal charged with a judicial responsibility and possessing judicial powers in the proceeding entrusted to it. Some of these powers are provided by 28 U.S.C. § 1651, the all-writs statute, and include the power to subpoena evidence.

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* We are aware of certain language in Attorney General Nelson's opinion to Secretary Upshur, 4 Ops. Att'y Gen. 201 (1843), to the effect that extradition does not involve the exercise of judicial power under Article III of the Constitution, and hence unconstitutional action could not be charged against the commissioner who heard the case. We do not rely on Article III as the basis of the judicial powers that a judge may exercise in an extradition case, but rather upon statutory responsibility and powers of a judicial nature. Attorney General Nelson's opinion is, therefore, not directed to the question that we ask this Court to decide.

The pertinent portion of the all-writs act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions. . . ." This text was adopted in the 1948 codification. Prior to that time the section limited the all-writs power to the "constitutional" courts. See, for example, 1 Stat. 81 (1789); Rev. Stat. § 716 (1875); 36 Stat. 1162 (1911). When the Judicial Code was revised in 1948 the House Judiciary Committee Report stated:

> "The revised section extends the power to issue writs in aid of jurisdiction to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts." H.R. Rep. No. 308, 80th Cong., 1st Sess. A145 (1947).

It is settled that a subpoena duces tecum is one of the writs that may be issued under the all-writs act. *American Lithographic Co.* v. *Werckmeister, supra.* And since the amendment of 1948, to include legislative tribunals, the Court of Claims has held that it derives a subpoena power from that statute. *Kamen Soap Products Co.* v. *United States, supra.* If the intention of Congress was, as the House report states, to make explicit the powers that were formerly implied from the creation of the courts, the writ powers must have been provided for all legislative tribunals that are charged with judicial responsibilities. This would surely include the extradition tribunal created by the extradition statute, since judicial powers under Section 1651 are not limited to any particular type of proceeding or to any particular type of court. Thus, where the effective exercise of jurisdiction requires the issuance of a subpoena, Section 1651 may be

invoked by the extradition judge, and the Court of Appeals' decision to the contrary introduces a new and unwarranted restriction upon that section and upon the effect of this Court's decision in the *Werckmeister* case.

In an extradition case there are strong reasons why the subpoena power is "necessary or appropriate" to the effective exercise of the jurisdiction of the extradition judge. There is a treaty obligation to the demanding country, in this case Venezuela, to surrender a person charged with or convicted of treaty crimes. This obligation is subject to the condition that surrender shall take place only

> "upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there." Article I, 43 Stat. 1699.

Similar treaty provisions have been held to establish a standard of sufficiency of evidence that is similar to that governing in preliminary proceedings in our domestic criminal courts, *i.e.*, a probable cause standard. *Charlton* v. *Kelly, supra; Grin* v. *Shine*, 187 U. S. 181; *Benson* v. *McMahon, supra.* As this Court has described the standard:

> ". . . we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining

> whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him." *Benson* v. *McMahon*, 127 U.S. 457, 463.

Since probable cause must be satisfied in extradition, it follows in common sense that a subpoena power should be available, similar to that which is available in preliminary examination under Rule 17(a), F.R. Crim. P., particularly in the light of the duty of the courts to construe liberally the powers exercised pursuant to a treaty, so as to encourage the objects of the treaty. See *Factor* v. *Laubenheimer, supra.*

The subpoena power is a "necessary or appropriate" writ for another reason. To deny to an extradition judge the power of subpoena would encourage the most flagrant abuse of the hospitality of this country by fugitive criminals seeking easy concealment of evidence of their guilt and of the fruits of their crimes. The position taken by the respondent banks obviously attracts deposits of fugitives who wish to conceal illegally gained riches, and, of course, it is likely that, if the subpoenas on the banks must be obeyed, depositors of this stripe will transfer their funds to a country the laws of which enforce secrecy in financial transactions. But in the United States a bank's interest in serving as a haven for the fruits of foreign crimes is not enough to put evidence beyond the reach of our courts. Surely an extradition treaty cannot be so easily frustrated as by the fugitive placing the evidence of crime in American hands.

Indeed, there are healthy signs that civilized opinion disapproves national policies that offer depositors virtual immunity from criminal investigation. The Juridical Committee of the 48th Conference of the Interparliamentary Union, at its meeting in Warsaw in September of 1959, adopted a resolution proposed by the Venezuelan delegation, reading in part as follows:

> "That the Conference of the Interparliamentary Union make an appeal to all the national groups for the purpose of encouraging in the legislative field, in international negotiations, and in the conscience of their respective peoples and governments, a common attitude based on principles of Justice and Law, in order to prevent public funds, misappropriated in any State by those in power through the abuse of said power, from being enjoyed with impunity and under guarantees in the territory of another State."

The full text of the resolution appears in Appendix 5.

The resolution was accepted by a 10-0 vote of the Juridical Committee, and has been set down for discussion at the next regional conference in Santiago, by action of the Executive Committee of the IPU. (See Appendix 5).

One's sense of the practical rebels at the futility of an extradition proceeding in which the judge can receive evidence only if it is volunteered. Judge Mathes, in proceedings before him on March 7, 1960, well expressed the disbelief that is prompted by the respondent banks' contention:

> "And if there are any unfriendly people whom he wishes to come into court and tell the truth

before the magistrate, there is no way he can compel them to come in? They may be standing out in the hallway and he can't get them? (Tr. 296.)

* * * * *

"I am forced to believe or take the view, as I see it, that this court either has it [power of compulsory process] or that it conducts a sterile hearing, hearing only people who want to come here . . ." (Tr. 328.)

The subpoena power has further point in extradition, when one considers that the defendant must be identified by proof. Identity is not established by the record of the foreign warrant of arrest, for it is the defendant before the American extradition judge who must be identified. If, as in this extradition case, the front bench of seats in the courtroom is filled with individuals who personally know the defendant and can identify him as the former dictator of Venezuela, is the judge unable to compel them to come forward and testify? Must the judge rely upon a witness to come forward and testify voluntarily? Neither Congress nor the framers of the Extradition Treaty intended the proceedings to be so easily frustrated.

C. IN ANY CASE THE UNITED STATES DISTRICT COURT HAS THE POWER TO ISSUE A SUBPOENA IN AID OF THE JURISDICTION OF THE JUDGE.

Even under different legislation which gave the extradition judge none of the characteristics of a legislative court for the purposes of 28 U.S.C. § 1651, the jurisdiction of the District Court itself would extend to action in aid of the proceeding before such a judge. Certainly the statutory assignment of extradition cases to a "judge", rather than to a "court",

does not deprive the judge of the support of the ancillary jurisdiction of his court. As this Court has said, "Many cases may be found in which the words 'court' and 'judge' were held to have been used interchangeably . . ." *The United States, Petitioner, supra* (unanimous opinion by Fuller, C.J.). In that case the Court had before it Section 13 of the Chinese Exclusion Act, 25 Stat. 479 (1888), which provided for hearing before a commissioner and an "appeal to the judge of the district court for the district . . .". The Court held that the effect of the statute was to place the appeal within the jurisdiction of the *district court itself* so as to require the clerk of the district court to enter judgment on the record and prepare a certified transcript for a further appeal. The clerk had refused to do so on the ground that the proceedings on appeal from the commissioner were before the judge as judge, rather than within the jurisdiction of the district court proper. In granting a writ of mandamus to compel the clerk to act, this Court cited and discussed a number of lower court precedents holding that statutory proceedings before a judicial officer lay also within the jurisdiction of the court itself for certain purposes.

A district court must retain some supervisory jurisdiction of an extradition case that is before a district judge, so as to insure the conduct of an orderly and effective proceeding. In proceedings before Judge Mathes, for example, the clerk of the District Court has filed in the court record the complaint, motions, rulings, transcript and evidence in the case. It would appear from this Court's decision in *The United States, Petitioner, supra,* that the clerk could be required to do so, had he refused. It is hardly

an extension of reasoning to say that the District Court must have available, if the judge does not, certain fundamental powers and process, such as subpoena and contempt powers, to insure that the proceeding before the judge is not an idle one. So it has been held in a statutory proceeding before a commissioner under the Chinese Exclusion Act:

> "I am not willing to concede, and protest against the doctrine advanced, that Congress has made a law authorizing the District Court to appoint commissioners, has prescribed the duties of such commissioners, including the power to try and determine certain questions in certain cases . . . but has left them powerless and the court without power to aid them, in an appropriate way, in the performance of such duties." *United States* v. *Tom Wah*, 160 Fed. 207, 210 (N.D.N.Y. 1908), *affirmed* 163 Fed. 1008 (2nd Cir. 1908), holding that a district court may compel a witness to testify in proceedings before a commissioner.

We submit that, in his capacity as a judge of the District Court, if not in his capacity as extradition judge, Judge Mathes had the power to issue and modify the subpoenas of November 25, and to hear and rule on motions directed to them. The decision of the court below, denying this power, is inconsistent with this Court's decision in *The United States, Petitioner, supra.*

D. THE EXTRADITION STATUTE AND TREATY PRESUPPOSE A SUBPOENA POWER IN AN EXTRADITION CASE.

One of the provisions of Article XI of the Treaty offers a strong suggestion that the executive and legislative authorities who framed and ratified the Treaty with Venezuela presupposed that a judicial

subpoena power would be available on behalf of the demanding country in extradition. That article, providing for the materials to be furnished to the government of which extradition is requested, reads in part as follows:

> "If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, *with such other evidence or proof as may be deemed competent in the case.*" 43 Stat. 1705. (Emphasis supplied.)

It is clear from this provision that the demanding country may offer evidence beyond that on which the original warrant there was based. No limitation is placed upon this evidence, except that it shall be "competent". So far as Article XI is concerned, this competent evidence may be procured prior to or after the arrest, in the demanding country or in the country where the fugitive is found, or anywhere else. The broad scope of Article XI clearly includes the use of evidence obtained in the United States after arrest. Extradition practice has permitted such evidence to be offered at the hearing, and examples may be found in the records of cases that have come to this Court. See Record, pp. 20-26 (30-41 in original) in *Bingham* v. *Bradley, supra;* Record, pp. 15-28 (31-54 in original) in *McNamara* v. *Henkel, supra.* Article XI obviously presupposes that the demanding government has some way to produce this evidence. And since the commands of the demanding government's courts do not extend to the United States, the only available means of producing the evidence in the

extradition case is by a subpoena of the American court.

A provision of the extradition statute, 18 U.S.C. § 3191, also furnishes a strong indication that Congress presupposed a subpoena power to be available to either party in extradition. That section provides for payment by the United States of the costs of witnesses subpoenaed on the motion of an indigent defendant:

> "§ 3191. *Witnesses for indigent fugitives*
>
> "On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States."

Section 3191 makes sense only if it is read to authorize the government to pay for a subpoena that derives its basic authority from other sources. It makes no sense if it is read to create a wholly new and restricted subpoena power. If there had been no subpoena power in extradition prior to the enactment of Section 3191, it is incredible that Congress would have created that power to be used solely on behalf of indigents, while withholding it from defendants who had a few hundred dollars. The purpose of Section 3191 must have been simply to place the expense of an existing remedy on the government, to remove the

practical bar of poverty. But the basic subpoena power was there all along.

The two provisions that we have discussed—that of the Treaty and that of the extradition statute—strongly suggest that a subpoena was assumed, by Congress and the executive, to be a proper adjunct to the duties and powers of the extradition judge. Another provision of Article XI of the Treaty confers wide latitude upon the extradition judge as to the method he may employ in exercising that power. That provision states:

> "It shall be competent for such diplomatic or superior Consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. *The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.*" 43 Stat. 1704. (Emphasis supplied.)

This language leaves to the judiciary wide discretion to lay down reasonable rules for an extradition proceeding, from the earliest stage—the arrest. The broad scope of the grant of discretion makes it plain that, in exercising substantive powers elsewhere conferred, including the subpoena power, the judge hearing the case is not to be imprisoned in the forms and procedures for other types of cases, in the absence of any uniform rules for extradition. Thus, the fact that Judge Mathes borrowed useful techniques from the Criminal and Civil Rules in framing his subpoenas, improvising a form of order to suit the occasion, is far from shocking—it would appear to be exactly the sort of exercise of discretion that Article XI contemplated.

Judge Mathes went no further than he had to go in order to bring material evidence before the court. He did not purport to lay down a comprehensive blueprint of procedure governing all aspects of the case, nor was he asked to do so. The particular need was an order responsive to this petitioner's motion and affidavit for production of evidence disclosed by the original extradition documents. A complication was the fact that no ready-made rules were at hand to govern the form of order. An extradition case is a unique proceeding, not readily compressed into established procedural molds, having some features in common with criminal proceedings and some features in common with civil actions. It is not a criminal case, since it is not a definitive trial of guilt. *Charlton* v. *Kelly, supra; United States ex rel. Oppenheim* v. *Hecht,* 16 F.2d 955, 956 (2d Cir. 1927), *certiorari denied,* 273 U.S. 769; *In re Lo Dolce,* 106 F. Supp. 455, 458 (W.D.N.Y. 1952); *United States ex rel. Klein* v. *Mulligan,* 1 F. Supp. 635, 636 (S.D.N.Y. 1931), *affirmed,* 50 F.2d 687 (2d Cir. 1931), *certiorari denied,* 284 U.S. 665. See also *United States ex rel. Austin* v. *Williams,* 6 F.2d 13 (E.D. La. 1925), *affirmed,* 12 F.2d 66 (5th Cir. 1926). Nonetheless, the defendant's liberty is at stake, and there are obvious similarities between extradition and preliminary examination in a criminal proceeding. *Charlton* v. *Kelly, supra; Benson* v. *McMahon, supra.* See *Collins* v. *Loisel,* 259 U.S. 309. In these circumstances the framing of an order that would effectively bring the evidence before the court, yet not do violence to the defendant's rights, required delicate judgment and thoughtful consideration by Judge Mathes. He examined carefully the plaintiff's need for the evidence, the legitimate interests of the defendant,

the banks and the depositors, and his own powers in the course of oral argument held before him on November 23, 1959, a portion of which is set out in the record (R. 82-88). He then designed an order to deal with his evaluation of all the conflicting interests before him. His orders of November 25 were designed to minimize the burden on the banks by giving them the option of furnishing the documents to counsel at a time and place of convenience, rather than appearing in court (Appendix 2, pp. 3, 8, 13). The interests of depositors were protected by severe restrictions on the disclosure and use that plaintiff's counsel might make of the bank records. Even after this painstaking effort the judge reconsidered the matter on December 14, 1959, in an extremely thorough hearing on motions to quash (R. 89-117), and modified his order to protect further the interests of the banks and ease any possible burden on them. His modifying order of December 15 (Appendix 2, p. 22) provided that records of transactions of less than $1,000 need not be produced; that records subsequent to June 30, 1958, need not be produced, and that plaintiff should reimburse the banks for any unusual expenses incurred in making response to the subpoenas. It is difficult to imagine a court going further than Judge Mathes went to give exhaustive consideration to the consequences of his orders. The dependence of Article XI of the Treaty upon such high and responsible standards of judicial discretion was not misplaced, and, in the absence of rules for extradition proceedings, the action of Judge Mathes was entirely reasonable.

II

SERVICE OF A SUBPOENA IN AN EXTRADITION CASE IS NOT LIMITED TO 100 MILES FROM THE PLACE OF HEARING

Respondents contended below that, even if a subpoena power exists in extradition, the subpoena cannot be served out of the district more than 100 miles from the place of hearing. We believe that the subpoena power is derived from authority that is not subject to the 100-mile limitation.

Plainly, any assertion of a 100-mile limitation on the service of subpoenas must be based upon Rule 45(e)(1), F.R. Civ. P. That is the only source of any such limitation. We believe that the Civil Rules *may* be invoked as an available source of authority, in the exercise of the discretion entrusted to the extradition tribunal. But the judge is not *confined* to the Civil Rules, many provisions of which are wholly inapposite to extradition. Our discussion in the earlier part of this petition has indicated bases of a subpoena power that are quite independent of Rule 45, *i.e.*, the practical need for a subpoena to satisfy the evidence requirements of Article I of the Treaty; the assumption, implicit in Article XI, that evidence in this country may be obtained after arrest; the strong indication in 18 U.S.C. § 3191 that a subpoena power is available to either party; the broad authority of the all-writs statute, 28 U.S.C. § 1651, to issue necessary writs.

The all-writs statute authorizes "all writs necessary or appropriate" in aid of the jurisdiction. The writ that was "necessary or appropriate" to satisfy the evidence requirements of the extradition case before Judge Mathes was a subpoena running to the banks

in New York and New Orleans, not merely a subpoena running 100 miles from court. The necessary writ was issued, though scrupulously limited. The quantity of records to be produced was confined. Disclosure of these records by the plaintiff was restricted. The financial burden on the banks was largely removed. But clearly no geographical limitation on service, short of the place where the records were, would have been "necessary or appropriate" to the occasion. On the contrary, such a limitation would have rendered the writ useless. In short, the necessary writs were issued and served, and are represented by the orders of November 25, and order of December 15, 1959 (Appendix 2, pp. 3, 7, 12, 17, and 22).

A subpoena under Section 1651, moreover, is not bound to the particular conditions specified by another statute or rule. In *American Lithographic Co.* v. *Werckmeister, supra,* it was urged that a subpoena duces tecum issued by the district court did not comply with the notice and hearing procedure required by Rev. Stat. § 724 for compulsory production by a party. This Court, in a unanimous decision by (then) Justice Hughes held that the subpoena power under Section 1651 was quite independent of the requirements and conditions of Rev. Stat. § 724. In *Kamen Soap Products Co.* v. *United States, supra,* the Court of Claims, following the *Werckmeister* decision, held that its power to issue a subpoena duces tecum for government documents under Section 1651 was not curtailed by other, and more specific, statutory provisions and rules for subpoena and production of documents. The subpoena power provided by Civil Rule 45 is limited by the conditions therein specified.

but the independent subpoena power of Section 1651 may be employed with greater flexibility.

Similarly, the grant of judicial discretion by Article XI of the Treaty with Venezuela does not contain any geographical limitation on the reach of our courts, and, on the contrary, opens wide latitude to the courts in devising methods for the exercise of their powers. The means and place of service of a subpoena is a matter of method within Article XI. If Article XI is to be accorded its purpose — and this Court has required treaty provisions to be interpreted generously to give full effect to their purposes, *Factor* v. *Laubenheimer, supra* — it should be read to provide the extradition judge with sufficient latitude to authorize service where service is necessary, particularly when the judge acts with that scrupulous care that characterized the orders of Judge Mathes.

No policy of judicial administration would require implying a 100-mile limitation on a subpoena issued under authority that is independent of Civil Rule 45. The 100-mile provision of Civil Rule 45 is not evidence of a general policy of restriction; a contrary policy is expressed by Criminal Rule 17(e), which authorizes service of a subpoena at any place within the United States, even when issued by a commissioner. The important similarities between extradition and preliminary examination in criminal proceedings — the fact that an individual's liberty is at stake and the probable cause standard of sufficiency of evidence — would justify a careful, selective borrowing from the rules applicable to preliminary examination, and these rules permit a subpoena without a 100-mile limitation. See Rule 17(a), (e), F.R. Crim. P.;

Manual for United States Commissioners (1943, rev. 1948), p. 9.

There are other important reasons that militate against implying a geographical restriction on the power of the extradition court or judge to compel evidence. The treaty obligation to surrender the fugitive, subject to a hearing of evidence, is an obligation of our national government, and it hampers the discharge of this obligation to subject it, without a clear command of Congress or the Treaty, to the technicalities of our domestic civil practice and the compartmentalized civil jurisdiction of our courts. It should be recalled that 18 U.S.C. § 3184 requires that the hearing take place where the fugitive is found. If the power of the court to reach evidence were limited to that district or 100 miles from the place of hearing, fugitives themselves could prevent the production of much incriminating evidence simply by keeping the necessary distance between themselves and the evidence.

It is far from clear that the banks or the depositors could assert the 100-mile objection, if the subpoena had been issued under Rule 45. The limitation imposed by that Rule is upon "a subpoena requiring the attendance of a witness at a hearing or trial . . ." It seems probable that the purpose of the rule is and always has been not to fix a limit to the reach of court process so much as to limit the distance of travel, and hence the burden and inconvenience, of the witness. See, for example, Section 6, Act of March 2, 1793, 1 Stat. 335. Against this purpose, the terms of the subpoenas of Judge Mathes are significant. They do not require the witnesses to attend court in Miami,

but give them the option of making the documents available to counsel at a time and place of convenience, in lieu of appearance in court. Indeed, the Hibernia Bank took advantage of this provision of the subpoena and obviated the necessity of appearance in court. Consequently, if a journey of more than 100 miles is required of officials of the respondent banks, it is only because they have declined the means extended to them to avoid this inconvenience, and any consequent burden is self-inflicted.

So far as the depositors are concerned, nothing is required of them, and they can have no standing to complain that a journey of more than 100 miles is required of an official of the bank.

III

THE DEPOSITORS CAN ADVANCE NO GROUND TO QUASH THE SUBPOENAS

The depositors do not have any legally protected interest to assert as ground for a motion to quash. The Court of Appeals apparently decided that they have, in the face of one of its own decisions and numerous decisions of other circuits.

Naturally, the depositors would prefer that their bank records not be subpoenaed, and that their financial transactions there recorded should not be disclosed. Nevertheless, one's preference for the obscurity of one's financial transactions does not provide a reason to quash a subpoena, but must yield to the common interest in disclosing the truth to serve the ends of justice. See *United States* v. *Bryan*, 339 U.S. 323, 331; 8 Wigmore, *Evidence* § 2192 (3d ed. 1940).

Certainly the depositors may not interpose any objections to the relevance of the evidence to which the subpoenas were directed, since relevance is governed by the issues between the parties, and is properly the concern of the parties alone. This well-settled rule has been applied by the federal courts to the standing of the witness himself to question relevance, and must be applied all the more forcefully to a depositor who is not a witness, but a stranger to the proceeding. 8 Wigmore, *Evidence* § 2210 (3d ed. 1940); *Shepherd* v. *Castle*, 20 F.R.D. 184 (W.D. Mo. 1957). See *Schutte & Koerting Co.* v. *Fischer & Porter Co.*, 6 Fed. Rules Serv. 45b.413, Case 2, at 522 (E.D. Pa. 1942); *United States* v. *Terminal R. Ass'n of St. Louis*, 148 Fed. 486 (E.D. Mo. 1906).

Moreover, the depositors have no property interest in the records—no custody, ownership or control. The records are in the possession, and are the property, of the banks. They do not belong to the depositors in any sense, so federal courts have repeatedly held. *Foster* v. *United States, supra* at 187-88; *Zimmerman* v. *Wilson, supra; United States* v. *Peoples Deposit Bank & Trust Co., supra* at 723-24; *In re Upham's Income Tax*, 18 F. Supp. 737, 738-39 (S.D.N.Y. 1937); *Cooley* v. *Bergin*, 27 F.2d 930, 932, 933 (D. Mass. 1928); *cf. United States* v. *First Nat. Bank of Mobile*, 295 Fed. 142, 143 (S.D. Ala. 1924), *affirmed per curiam*, 267 U.S. 576. See also *McMann* v. *SEC, supra* at 378-79. It is firmly established that a depositor is merely a creditor of a bank. *E.g., Bank of the Republic* v. *Millard*, 10 Wall. 152; *Ross* v. *Knott*, 13 F. Supp. 963, 965 (N.D. Fla. 1936), *affirmed*, 8 F.2d 817 (5th Cir. 1937), *affirmed, sub nom. McNair* v. *Knott*, 302 U.S. 369;

Calamita v. *The Tradesmens Nat. Bank,* 135 Conn. 326, 64 A.2d 46, 48-49 (1949); *Benge* v. *Michigan National Bank,* 341 Mich. 441, 67 N.W.2d 721, 723 (1954).

The claim of privilege (see briefs in the Court of Appeals of Fortunato Herrera and Pedro Gutierrez Alfaro, R. 382-83, 583) by a bank depositor or broker's customer is not a novel claim and federal courts of appeals have had several opportunities to make it very clear that there is no such privilege against the subpoena power of the court. Square decisions on this point have been rendered by the Court of Appeals for the District of Columbia, and by the Second, Fifth and Seventh Circuits. *Bowles* v. *Shawano Nat. Bank, supra; Societe Internationale* v. *McGranery, supra* at 443; 8 Wigmore, *Evidence* § 2286 (3d ed. 1940). Limburg, *The Bankers' and the Brokers' Privilege,* 25 Colum. L. Rev. 152, 154-95 (1925); *cf. McMann* v. *SEC, supra* (denying privilege claimed by broker's customer). *Falsone* v. *United States, supra* at 739-42.

A bank's records of the account of a depositor are, of course, to be distinguished from bank records in which the government of the United States has a property interest and a privilege arising from specific statutory provisions. See *Overby* v. *United States Fidelity and Guaranty Company,* 224 F.2d 158 (5th Cir. 1955). In this present case there is no statute under which a privilege can be claimed.

CONCLUSION

The questions of judicial power and the manner of its exercise, passed upon by the court below, are important and unsettled questions that will recur in the present extradition case and in cases arising in the future under similar treaties and the extradition

statute, until definitively decided by this Court. The decision below clearly runs contrary to the Treaty with Venezuela and to the act of Congress governing extradition, and it places an unwarranted limitation upon the all-writs act as interpreted by this Court. The Court of Appeals rejected the representations of two national governments, without any statement of the reasons for its decision, in a case of great public controversy in which are involved the political relations of the United States with Venezuela and with many other American republics. We urge the Court, therefore, to grant the writ of certiorari and reverse the judgment below.

Respectfully submitted,

DEAN ACHESON
HOWARD C. WESTWOOD
DAVID C. ACHESON
701 Union Trust Building
Washington 5, D. C.

WILLIAM G. WARD
1240 duPont Building
Miami 32, Florida

SIDNEY S. SACHS
737 Woodward Building
Washington 5, D. C.

Attorneys for Petitioner

COVINGTON & BURLING
WARD & WARD
SACHS & JACOBS

Of Counsel

April 1960

APPENDIX 1

Statutes and Treaty Provisions Involved

The governing treaty is the Extradition Treaty of January 19, 1922, between the United States and Venezuela, 43 Stat. 1698, which contains, in pertinent part, the following provisions:

"ARTICLE I.

"The Government of the United States of America and the Government of the United States of Venezuela agree to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been convicted of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II of this Convention, while said person was actually within such jurisdiction when the crime was committed, and who shall seek an asylum or who shall be found within the territories of the other. Such surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there.

* * *

"ARTICLE XI.

* * *

"It shall be competent for such diplomatic or superior Consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.

"If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If,

however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case."

Section 3184 of Title 18 of the United States Code provides as follows:

"§ 3184. Fugitives from foreign country to United States.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Section 3191 of Title 18 of the United States Code provides as follows:

"§ 3191. Witnesses for indigent fugitives.

"On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States."

Section 1651(a) of Title 28 of the United States Code provides as follows:

"§ 1651. Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

APPENDIX 2

Orders of the United States District Court for the Southern District of Florida, Miami Division

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*

ORDER

THIS CAUSE having come on to be heard on motion of the defendant for a protective order, and the Court having heard the arguments of counsel and being duly advised in the premises, and it being the opinion of the Court that for counsel's guidance and in the interest of proper administration of justice in this cause and within the Court's discretion that fixed rules of procedure should be established for all matters relating to this cause and the Court being of the further opinion that the Federal Rules of Criminal Procedure are the most appropriate for the most part, as opposed to Federal Rules of Civil Procedure, it is hereby

ORDERED, ADJUDGED and DECREED that as may relate to this particular cause all matters of procedure will be subject to the provisions of the Federal Rules of Criminal Procedure as they may apply and the Federal Rules of Civil Procedure will not apply, and it is further

ORDERED, ADJUDGED and DECREED that the Notice of Taking Depositions of George F. Nolte, Assistant Vice-President of the First National City Bank of New York, and other unknown officers and employees of that bank, at 10:30 A.M., November 6, 1959, at New York, and all summonses connected therewith, be and the same are hereby vacated, the taking of testimony pursuant to said notice and sum-

monses prohibited, and the parties concerned protected against failure of non-compliance therewith.

DONE and ORDERED at Miami, Florida, this 13th day of November, 1959.

/s/ EMETT C. CHOATE
Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*

ORDER

THIS CAUSE coming on to be heard upon the Petition of the Plaintiff to amend the protective Order of November 13, 1959, and the pronouncements therein, and the Court being advised in the premises, the Court is of the opinion that the Order entered on November 13, 1959 ordering that the procedure for taking of depositions of witnesses in the United States as permitted under the Federal Rules of Civil Procedure should not apply and the procedure is to be governed as stated in the Treaty. That the Court is of the opinion that the right of subpoena exists as relates to witnesses and further that the Court may, by order, provide for the securing of testimony where a witness cannot be secured to appear before the Court. It is,

ORDERED, ADJUDGED and DECREED that the Order of November 13, 1959 entered in the above cause, be and the same, is hereby vacated in so far as it relates to the estab-

lishment of special rules governing procedure in the above styled case.

DONE and ORDERED in Chambers in the Federal Courthouse, Dade County, Florida, this 23rd day of November, 1959.

/s/ EMETT C. CHOATE
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, *Plaintiff*.

v.

MARCOS PEREZ JIMENEZ, *Defendant*

SUBPOENA

To: GEORGE F. NOLTE
Assistant Vice-President
The First National City
Bank of New York
55 Wall Street
New York, N. Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N.E. 1st Avenue, City of Miami, Florida, on the 14th day of December,

1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; PROVIDED that such appearance need not be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

If counsel for the plaintiff or defendant take copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.

the contents of such copies shall not be disclosed by such counsel to any person other than the plaintiff or the defendant herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

/s/ WM. C. MATHES
U. S. District Judge

November 25, 1959

RETURN ON SERVICE

Received this writ at New York, N.Y. on Dec. 2, 1959 and on Dec. 2, 1959 at 20 Exchange Place, N.Y.C. New York, N.Y., I served it on the within-named George F. Nolte, Asst. Vice-Pres. The First National City Bank of N.Y. by leaving a copy thereof ~~or a subpoena ticket with~~ and ck for $119.68 with him.

THOMAS J. LUNNEY
U.S. Marshal, SDNY
By: /s/ HARRY J. CARITO
Deputy U.S. Marshal, SDNY

Marshal's Fees

Travel	$ .30
Service	$ .50
	$ .80

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) deposited or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each ac-

count maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the First National City Bank of New York (including its predecessor the National City Bank of New York) in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy

Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.

7. The foregoing paragraphs shall not require production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General
of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*

SUBPOENA

To: WALTER ANDERSON
Secretary
French American
Banking Corporation,
31 Nassau Street,
New York City, N.Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under

Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N.E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; PROVIDED that such appearance need not be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

If counsel for the plaintiff or defendant takes copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.
Banco Provincial de Venezuela,

the contents of such copies shall not be disclosed by such counsel to any person other than the Plaintiff or the Defendant herein without further order of this Court, except as may be necessary in the course of offering any such

matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

/s/ Wm. C. Mathes
U.S. District Judge

November 25, 1959

Return on service

Received this subpoena at New York City on Nov. 30, 1959 and on Dec. 3, 1959 at 120 Broadway, NYC, served it on the within named Walter Anderson, Secretary, by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law. (U.S. 119.68)
Dated: 12/3/59

/s/ Thomas J. Lunney
U.S. Marshal

By /s/Harry J. Carito
Deputy

Service Fees
Travel $
Services

Total $

Subscribed and Sworn to before me, a this 4th day of December, 1959.

/s/ Frank P. Costa
Frank P. Costa
Notary Public State of N.Y., No. 03-5829350
Qualified in Bronx County
Commission Expires March 30, 1960

U. S. Marshal
S.D.N.Y.

Fees ..... $ .50
Mileage ..... $ .30

Expenses Total ..... $ .80

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts, and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts, and bills of exchange (both sides) deposited or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the French American Banking Corporation in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C. A.
Edificio Washington, C. A.

7. Originals or copies of all records, statements of account, deposit slips, acknowledgments, advices or notations of deposit, credit, debit, transfer or withdrawal, and memoranda, instructions, correspondence, and all other records and written communications and all records of any oral communications, whether internal or external, from March 14, 1949 to November 25, 1959 (inclusive) relating to the entire transaction or series of transactions of French American Banking Corporation with the Banco Provincial de Venezuela that are referred to in a letter of December 1,

1954 from Marcos Perez Jimenez to French American Banking Corporation, and in French American Banking Corporation's reply and enclosure of December 7, 1954.

8. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General
of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*

SUBPOENA

To: J. W. GANAAN,
Agent
Royal Bank of Canada (New York Branch)
68 William Street,
New York, N. Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N. E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the

attached schedule; PROVIDED that such appearance need not be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

If counsel for the plaintiff or defendant takes copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.,

the contents of such copies shall not be disclosed by such counsel to any person other than the plaintiff or the defendants herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

/s/ WM. C. MATHES
U. S. District Judge

November 25, 1959

RETURN ON SERVICE

Received this subpoena at New York City on Nov. 30, 1959 and on December 3, 1959 at 68 William Street, NYC served it on the within named J. W. Ganaan, true name

J. W. Ganenn, agent by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.
Dated:

December 3, 1959

/s/ THOMAS J. LUNNEY
U.S. Marshal
By /s/ HARRY J. CARITO
Deputy

Service Fees
Travel $
Service
Total $.....

SUBSCRIBED AND SWORN to before me, a this 4th day of December, 1959.

/s/ Frank P. Costa
FRANK P. COSTA
Notary Public State of N.Y., No. 03-5829350
Qualified in Bronx County
Commission Expires March 30, 1960
U. S. Marshal
S.D.N.Y.
Fees ..... .50
Mileage ..... .30
Expenses
Total ..... .80

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) drawn from March 14, 1949, to November 25, 1959 (inclusive) against each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada

in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) deposited or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in The New York Branch (including any office in New York) of The Royal Bank of Canada in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear,

and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.

7. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*

SUBPOENA

To: ISAAC B. GRAINGER, President
Chemical Corn Exchange Bank
165 Broadway
New York 15, N. Y.

On motion of the plaintiff supported by affidavit in this cause, a proceeding on complaint for extradition under Section 3184 of Title 18 of United States Code, and pursuant to such section and to the Treaty of Extradition between the United States and the Republic of Venezuela,

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of Florida, Miami Division, at the Federal Building, 300 N.E. 1st Avenue, City of Miami, Florida, on the 14th day of December, 1959, at 10:00 o'clock a.m. and bring with you the documents, records and other materials specified in the attached schedule; PROVIDED that such appearance need not be made if, prior to December 14, 1959, such documents, records, and other materials are made available to counsel for the plaintiff, and are similarly made available to counsel for the defendant if counsel for the defendant so desires, for inspection, copying and the taking of copies.

If counsel for the plaintiff or defendant take copies of any documents, records or other materials with respect to the accounts of any of the following:

Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C.A.
Edificio Washington, C.A.

the contents of such copies shall not be disclosed by such counsel to any person other than the plaintiff or the defendant herein without further order of this Court, except as may be necessary in the course of offering any such matter in evidence in this proceeding or in the course of preparing copies thereof for the purpose of such offer.

/s/ WM. C. MATHES
U. S. District Judge

November 25, 1959

RETURN ON SERVICE

Received this subpoena at New York City on Nov. 30, 1959 and on Dec. 3, 1959 at 165 Broadway served it on the within named Isaac B. Grainger, Pres. by (illegible), Marilyn Ryan, Sect., by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law. (Chk. $119.68).

Dated:

December 3, 1959

/s/ THOMAS J. LUNNEY
U. S. Marshal
/s/ HARRY J. CARITO
Deputy

Service Fees
Travel $
Services
Total $

SUBSCRIBED AND SWORN to before me, a this 4th day of December, 1959.

/s/ FRANK P. COSTA
Notary Public
Commission Expires March 30, 1960
(SEAL)

U. S. Marshal
S.D.N.Y.
Fees ..... .50
Mileage ..... .30
.80

SCHEDULE

1. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) drawn from March 14,

1949, to November 25, 1959 (inclusive) against each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

2. Photostatic or photographic copies of all checks, drafts and bills of exchange (both sides) deposited or credited from March 14, 1949, to November 25, 1959 (inclusive) to each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

3. Originals or copies of all statements of account (bank statements) and advices of balance, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

4. Originals or copies of all deposit slips and all memoranda, acknowledgments or notations of deposit, credit, transfer or withdrawal, from March 14, 1949, to November 25, 1959 (inclusive) with respect to each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

5. Originals or copies of all internal and external instructions, correspondence and other records or written communications, and all records of any oral communications, from March 14, 1949, to November 25, 1959 (inclusive), with respect to each account maintained in the Chemical Corn Exchange Bank in the name or for the benefit of any person or entity listed in paragraph 6.

6. The following persons and entities, without regard to any variation between the following names and the style of any account in which one or more of these names appear, and without regard to the joint or fiduciary character of any account:

Marcos Perez Jimenez
Flor Chalbaud de Perez Jimenez
Margot Perez Chalbaud
Florangel Perez Chalbaud
Maria Sol Perez Chalbaud
Flor de Maria Perez Chalbaud
Rosa Perez Jimenez de Vargas
Francisco Perez Jimenez
Juan Perez Jimenez
Napoleon Dupouy
Laureano Vallenilla Lanz
Luis Felipe Llovera Paez
Carlos Pulido Barreto
Fortunato Herrera (Haddad)
Silvio Gutierrez
Pedro A. Gutierrez Alfaro
Lola T. Gutierrez Alfaro
Pedro A. Peters
Virgil C. Applewhite
Polinversiones, C. A.
Edificio Washington, C. A.

7. The foregoing paragraphs shall not require the production of documents, records, memoranda, correspondence or other materials that are in a foreign country.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-Civil

MANUEL ARISTEGUIETA, Consul General
of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*

ORDER ON HEARING OF DECEMBER 14, 1959 GRANTING MODIFICATION OF SUBPOENAS AND DENYING MOTIONS

This cause was continued from the hearing of November 23, 1959, as set forth in the order of this Court dated November 25, 1959. That order provided, among other things:

> "The plaintiff has presented its motion for an order of this Court permitting and directing the issuance of certain subpoenas, which said matters will be settled by this Court by separate order.
>
> "IT IS FURTHER ORDERED that this cause and further proceedings herein shall be continued until 10:00 o'clock a.m. of December 14, 1959, at which time the defendant is hereby directed to be present in Court."

Pursuant to that order, this cause came on to be heard at 10 o'clock a.m. of December 14, 1959; the defendant and his counsel were present in court, and the plaintiff was represented in court by his counsel.

As stated in the aforesaid order of November 25, 1959, the plaintiff had submitted a motion for the issuance of certain subpoenas, and this Court, on November 25, 1959, entered a further order granting the said motion and issued subpoenas directed to the persons set forth in the affidavit attached to said motion, which persons were as follows:

(a) George F. Nolte, Assistant Vice-President
First National City Bank of New York
(successor to National City Bank of New York),
55 Wall Street, New York City, N. Y.

(b) Walter Anderson, Secretary
French American Banking Corporation,
31 Nassau Street, New York City, N. Y.

(c) J. W. Ganaan, Agent
Royal Bank of Canada (New York Branch),
68 William Street, New York, N. Y.

(d) Isaac B. Grainger, President
Chemical Corn Exchange Bank,
165 Broadway, New York 15, N. Y.

(e) Wallace M. Davis, President
The Hibernia National Bank In New Orleans
Carondelet, Gravier & Union Street,
New Orleans, La.

At the hearing on December 14, 1959, it appeared that service of the subpoenas had been effected, and on that day the subpoenas as served were filed with the Clerk of this Court, except as hereinafter noted.

From statement of counsel for the plaintiff, it appeared that when the subpoena was served upon Wallace M. Davis, the President of the Hibernia National Bank in New Orleans, counsel arranged with counsel for said Bank for the making of photostatic copies of records assembled by said Bank in response to the subpoena, and that such copies of said instruments were furnished to plaintiff's counsel and to defendant's counsel, thus obviating at this time the necessity for further return or further appearance by the said Wallace M. Davis, without prejudice to the rights of either party to this cause to request additional information by additional subpoena or orders of this Court upon further

application. The further provisions of this order, therefore, do not apply with respect to the subpoena directed to the said Wallace M. Davis.

In the interim between November 25, 1959, and December 14, 1959, certain motions were filed, as follows:

A motion was filed on behalf of the defendant by his counsel, David W. Walters, to quash or modify all of the aforesaid subpoenas.

A motion was filed by the firm of Fowler, White, Gillen, Humkey & Trenam as attorneys for the First National City Bank of New York, for the French American Banking Corporation, and for the Royal Bank of Canada, to quash the subpoenas respectively served upon officers of the said respective Banks.

A motion was filed by the firm of Smathers, Thompson & Dyer as attorneys for Silvio Gutierrez as a depositor in the Chemical Corn Exchange Bank to quash the portion of the subpoena directed to an officer of said Bank pertaining to his account or accounts with said Bank.

A motion was filed by Scott, McCarthy, Preston, Steel & Gilleland as attorneys for Napoleon Dupouy, a depositor in the French American Banking Corporation and in the First National Bank of New York to quash the subpoenas directed to officers of such Banks, insofar as they pertained to him.

In the course of the hearing of December 14, 1959, the defendant through his counsel also filed an additional motion to discharge the defendant from custody and to dismiss the proceedings.

There were present at the hearing of December 14, 1959, counsel for the First National City Bank of New York, for the French American Banking Corporation, and for the Royal Bank of Canada, counsel for Silvio Gutierrez and

counsel for Napoleon Dupouy. There was also present a representative of Chemical Corn Exchange Bank; he advised the Court that the name of such bank is now Chemical Bank New York Trust Company.

After hearing extensive argument of all counsel and being duly advised in the premises, IT IS ORDERED, ADJUDGED and DECREED as follows:

1. The respective motions to quash the subpoenas be and the same are hereby severally denied.

2. The defendant's motion was in the alternative either to quash the subpoenas or to grant modification, and after due consideration, including consideration of the suggestions or comments of various counsel and those of the representative of the Chemical Corn Exchange Bank (now Chemical Bank New York Trust Company), the Court has determined that some modification would be advisable; therefore the subpoenas as issued shall be and hereby are modified in the following particulars:

a. The documents evidencing deposits or withdrawals in the accounts of the various persons specified in the subpoenas which are called for by the subpoenas are limited to deposits or withdrawals of $1,000 or more in United States currency or its equivalent.

b. The period set forth in the subpoenas, which was from March 14, 1949, to and including November 25, 1959, is amended to the period from March 14, 1949, to and including June 30, 1958.

c. The return date of the subpoenas is changed from December 14, 1959, to 10 o'clock a.m. of January 4, 1960.

3. The defendant's motion to be discharged from custody and to dismiss the proceedings, be and the same is hereby denied, without prejudice.

4. Since this modification of the subpoenas has been announced in open court and all parties concerned were represented before the Court, these modifications of the subpoenas shall stand as the order of this Court without further necessity of personal service, and the parties concerned shall take notice forthwith of the contents of this order, but counsel for the plaintiff shall serve a copy of this order by mail upon each of the parties upon whom the subpoenas were served, and upon counsel for the individual depositors who have filed their separate motions herein.

5. In the examination of their records and the preparation of information or copies of the same, the said Banks may incur unusual expenses which would not be covered by the usual witness fees as usually allowed in transactions of this type. If so any of such Banks claiming such unusual expenses may file a motion with this Court setting forth a complete statement of their time and services rendered and the expense thereof, and, unless such expenses can be stipulated to and paid by plaintiff, this Court reserves the right, upon appropriate notice and hearing, to fix a reasonable amount for the reimbursement of said expenses.

6. All proceedings in this cause shall be continued until 10 o'clock a.m. January 4, 1960, at which time the defendant shall present himself in open court.

WM. C. MATHES
United States District Judge

December 15, 1959.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

ORDER AFTER HEARING ON JANUARY 4, 1960, ON MOTIONS TO QUASH SUBPOENAS, MOTIONS TO EXTEND THE RETURN DAY OF SUBPOENAS, AND OTHER MATTERS

THIS CAUSE came on to be heard pursuant to the Order on Hearing of December 14, 1959, entered by this Court on December 15, 1959, continuing the hearing herein until January 4, 1960, at 10 o'clock a.m.

The defendant was present in person before the Court, and both the plaintiff and defendant were represented by counsel present before the Court.

Certain named officials of The First National City Bank of New York, the French American Banking Corporation, and the Royal Bank of Canada have heretofore been served with subpoenas which, as subsequently modified, required them to appear and produce records in this cause on January 4, 1960, at 10 o'clock a.m. The aforesaid banks, on December 30, 1959, filed their collective Motion for Extension of the Return Day of the Subpoenas as Modified, in which it was set forth that the movents had filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the order entered in this proceeding on December 15, 1959, denying their motion to quash the subpoenas served upon their officials, and setting forth further that it would be impossible for some of the movent banks to make the necessary preparations to

respond to the said subpoenas by the said return day of January 4, 1960. The movent banks were represented by Mr. Walter Humkey, who was present before the Court.

Upon consideration of this motion, after being duly advised in the premises, it is ORDERED, ADJUDGED and DECREED that the said motion for an extension of the return day be and the same is hereby denied insofar as movents' prayer was based upon their appeal to the United States Court of Appeals for the Fifth Circuit.

Upon further consideration of the aforesaid motion insofar as it seeks a reasonable extension of the return day to enable the said banks to complete their preparations to comply with the subpoenas, and to that extent the plaintiff having raised no objection thereto, it is ORDERED, ADJUDGED and DECREED that the return day of the said subpoenas be extended to January 27, 1960, at 10 o'clock a.m.

The aforesaid extension of the return day shall also apply to the subpoena heretofore issued to a named official of the Chemical Bank New York Trust Company (formerly Chemical Corn Exchange Bank), which subpoena, as modified, was also returnable on January 4, 1960. Counsel for said bank had requested by letter to this Court dated December 30, 1959, that the return day of such subpoena be extended to January 25, 1960, because such time was found necessary to enable such bank to comply with such subpoena.

The defendant, through his counsel, David W. Walters, asked that his objection to any extension of the return day with reference to any of the subpoenas be noted. Upon due consideration, the said objection of the said defendant shall be and the same is hereby overruled.

All other proceedings in this cause, other than those which are the subject of subsequent paragraphs of this Order, are hereby continued until January 27, 1960, at 10 o'clock a.m., at which time the defendant shall be present in person.

Subsequent to December 15, 1959, certain motions to quash were filed by parties alleging themselves to be depositors in one or more of the banks whose records have been subpoenaed, as follows:

A Motion to Quash on behalf of Fortunato Herrera and Polinversiones, C.A., was filed by their attorney, Mr. Richard H. Hunt, who was represented in Court by Mr. Norman Sand. The purpose of said motion was to quash those portions of the subpoenas pertaining to the account or accounts of Fortunato Herrera and Polinversiones, C.A.

Upon consideration of this motion, after being duly advised in the premises, it is ORDERED, ADJUDGED and DECREED that said motion to quash be and the same is hereby denied.

Pedro A. Gutierrez Alfaro and Lola T. De Guttierrez Alfaro, also known as Lola T. De Gutierrez Alfaro, also filed a Motion to Quash, by their attorney, Mr. L. J. Cushman, who was present in Court. The purpose of said motion was to quash the subpoena served upon a named official of the First National City Bank of New York, insofar as said subpoena pertained to the account or accounts of the movents.

Upon consideration of this motion, after being duly advised in the premises, it is ORDERED, ADJUDGED and DECREED that said motion to quash be and the same is hereby denied.

Subsequent to December 15, 1959, Silvio Gutierrez, through his attorneys, Smathers, Thompson & Dyer, filed a Motion to Stay seeking to extend the return day of the subpoena directed to a named official of the Chemical Bank New York Trust Company, insofar as his account in said bank was concerned. The said party had prior to the hearing of December 14, 1959, filed a motion to quash the said subpoena, which motion was denied by this Court in its order of December 15, 1959. In substance the present motion to stay sets forth that said Silvio Gutierrez has filed

a notice of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the order of December 15, 1959, relating to said movent, and asks that, based upon said appeal, this Court extend the return day of said subpoena. Said Silvio Gutierrez was represented before Court by Mr. L. S. Bonsteel.

Upon consideration of this motion, after being duly advised in the premises, it is ORDERED, ADJUDGED and DECREED that the said motion to stay based upon said appeal be and the same is hereby denied, but it is noted that the return day of the subpoena in question has been heretofore in this Order extended to January 27, 1960, at 10 o'clock a.m.

Subsequent to December 15, 1959, Napoleon Dupouy, through his attorneys, Scott, McCarthy, Preston, Steel & Gilleland, filed a Motion to Stay seeking to extend the return day of the subpoenas directed to named officials of the French American Banking Corporation and the First National City Bank of New York, respectively, insofar as his account or accounts in said banks were concerned. The said party had prior to the hearing of December 14, 1959, filed a motion to quash the said subpoenas, which motion was denied by this Court in its order of December 15, 1959. In substance the present motion to stay sets forth that Napoleon Dupouy has filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the order of December 15, 1959, relating to said movent and asks that, based upon said appeal, this Court extend the return day of said subpoenas. Said Napoleon Dupouy was represented before the Court by Mr. Robert J. Beckham.

Upon consideration of this motion, after being duly advised in the premises, it is ORDERED, ADJUDGED and DECREED that the said motion to stay based upon said appeal be and the same is hereby denied, but it is noted that the return day of the subpoenas in question has been heretofore in this Order extended to January 27, 1960, at 10 o'clock a.m.

During the hearing counsel for the defendant made an oral motion to have the Court order that the plaintiff be required to be personally present at any hearings in this cause at which the defendant is required to be personally present. The Court announced that it was aware of no requirement of law which made the appearance of the plaintiff in Court on a hearing such as this jurisdictional but, since there was no objection by plaintiff's counsel, it is ORDERED that in all further hearings in this cause the plaintiff shall be personally present at such times as the defendant's personal presence is required. After this matter was raised by the defendant's counsel at the hearing, the plaintiff's counsel communicated with the plaintiff who came to the hearing and was personally present during the remainder thereof.

DONE AND ORDERED this 4th day of January, A.D., 1960.

WM. C. MATHES
United States District Judge

(Filed January 11, 1960).

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

ORDER GRANTING PERMISSION TO TAKE DEPOSITIONS

The plaintiff prior to March 7, 1960, filed in this Court a Motion for Permission to Take Depositions, accompanied

by a certificate of service showing service by mail on February 25, 1960, on counsel for certain persons, including the three banks referred to herein, who might be affected by such motion. After argument on March 7 and 8, 1960, by counsel for the plaintiff, in support of such Motion, and by counsel for the defendant, counsel for the First National City Bank of New York, French American Banking Corporation and Royal Bank of Canada, and counsel for certain depositors in such banks, in opposition to such Motion,

And the Court being of the opinion that the decision of the United States Court of Appeals for the Fifth Circuit in the case referred to in such Motion (No. 18176, order entered Feb. 1, 1960) was limited to the question before that Court, that is the question of the power of this Court to issue subpoenas, returnable before this Court in Miami, Florida, to be served upon persons in New York City more than 100 miles from Miami, Florida,

And the Court being of the further opinion that, under the Treaty and statutes here involved, procedure for the securing of evidence from persons unwilling to produce evidence voluntarily should be and is available in the manner provided in Rules 26 and 45, and related provisions of the Federal Rules of Civil Procedure, for the taking of depositions of witnesses pursuant to subpoenas, including subpoenas duces tecum, in accordance with the territorial limitations provided in such Rules,

And the Court being of the further opinion that, in the particular circumstances of this case and in the light of the charges being made herein by the plaintiff, the proceedings held in this case, and the showing heretofore made by the plaintiff, the taking of such depositions in such manner of officials of the banks specified herein should be permitted in this case,

It is ORDERED, ADJUDGED AND DECREED that:

(a) The plaintiff be and hereby is granted permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including, without limitation, procedure for subpoenas duces tecum, to secure evidence from any appropriate officials of First National City Bank of New York, of French American Banking Corporation, and Royal Bank of Canada, all in New York City;

(b) In connection with a return to such subpoenas duces tecum as may be issued, the aforesaid banks, in the examination of their records and the preparation of information or copies thereof, may incur unusual expenses which would not be covered by the usual witness fees as usually allowed in transactions of this type; if so any of such banks claiming such unusual expenses may file a motion with this Court setting forth a complete statement of their time and services rendered and the expense thereof, and, unless such expenses can be stipulated to and paid by plaintiff, this Court reserves the right, upon appropriate notice and hearing, as a condition to the issuance of such order, to fix a reasonable amount for the reimbursement of said expenses; and

(c) The defendant be and hereby is permitted by this Court to go to the place of, and to be in attendance at, the taking of each such deposition.

DONE AND ORDERED this 9th day of March, 1960.

WM. C. MATHES
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

ORDER CONFIRMING ACTIONS TAKEN IN OPEN COURT ON MARCH 7 AND 8, 1960

This cause came on to be heard at 10 o'clock a.m. on March 7, 1960, pursuant to orders entered by this Court on January 4 and January 26, 1960. Both plaintiff and defendant were personally present in court. The hearing continued through March 7 and March 8, 1960. At this hearing several matters were presented to the Court for determination, which were ruled upon as follows:

1. An Order on Mandate was entered in connection with the Mandate of the United States Court of Appeals for the Fifth Circuit in Case No. 18176, respecting certain subpoenas duces tecum issued by this Court on November 25, 1959.

2. A petition in connection with bank records heretofore furnished counsel for both parties by the Hibernia National Bank in New Orleans was filed by said Bank by and through its counsel, Miller Walton, which petition after argument was dealt with by separate order entered herein.

3. Defendant by counsel presented a Motion to Quash the Orders of this Court entered on November 25, 1959, for subpoenas duces tecum directed to officials of First National City Bank of New York, French American Banking Corporation, Royal Bank of Canada, Chemical Bank New York Trust Company, and Hibernia National Bank in New

Orleans. After argument, such Motion was denied without prejudice to its renewal at some later time if counsel for the defendant is so advised.

4. Plaintiff's Motion for Permission to Take Depositions was considered by the Court and is disposed of by a separate order entered on this date.

5. In connection with the argument on said Motion it was pointed out that the Motion sought permission to take the deposition of an official of Chemical Bank New York Trust Company. Since a question exists as to whether the appeal of Silvio Gutierrez to the United States Court of Appeals for the Fifth Circuit from the order of this Court denying a motion to quash a subpoena directed to such official has been decided by the Court of Appeals or remains undecided by such Court, counsel for the plaintiff undertook to file in the Court of Appeals on or before March 17, 1960, a motion to dismiss such appeal if it remains undecided and is pending in such Court. It appeared to this Court that it would be appropriate to await a ruling on such motion before determining whether permission should be granted to the plaintiff for the taking of the deposition of an official of Chemical Bank New York Trust Company. Therefore, the order separately entered by this Court on plaintiff's Motion for Permission to Take Depositions does not include the taking of a deposition of an official or officials of Chemical Bank New York Trust Company, that matter being deferred for later consideration at an appropriate time.

6. After disposition of the plaintiff's Motion for Permission to Take Depositions, counsel for the interested parties discussed with the Court the question of the time when plaintiff would seek to have such depositions taken. Counsel for the defendant indicated that he would present a motion for a protective order under Rule 30 of the Federal Rules of Civil Procedure when the plaintiff gave notice of the taking of such depositions, and it was desired by

counsel for the defendant that there be an opportunity to present such motion to this Court at a time convenient to this Court prior to the taking of depositions. Accordingly it was agreed by counsel for the plaintiff that his notice of taking depositions would fix a date no earlier than April 15, 1960, for the taking thereof, and that such notice would be filed in time sufficient to enable counsel for the defendant to present to this Court his motion for a protective order at the next hearing in this case. Counsel for the plaintiff also agreed that there would accompany such notice a copy of the subpoenas duces tecum which counsel for the plaintiff would propose to have issued in connection with the taking of such depositions.

7. Plaintiff presented a Second Amended Complaint. The Court overruled objections by the defendant to the filing thereof, without prejudice. Thereupon, said Complaint was sworn to by the plaintiff in open court and the Court permitted its filing.

8. On application by the plaintiff the Court thereupon issued a new Warrant for the arrest of the defendant which was served upon the defendant by a Deputy United States Marshal in open court. The defendant having been taken into custody under the said Warrant by the Deputy United States Marshal, the Court with consent of both plaintiff and defendant approved the release of the defendant upon the security of the cash bond in the sum of $25,000 previously posted by the defendant upon his release from the prior outstanding Warrant for his arrest, and upon the conditions attached to such previous release as those conditions have been amended. The Court directed that the necessary entries to effect the transfer of bond be made by the Clerk and the Marshal. The Court directed that the prior outstanding Warrant against the defendant, being no longer in force and effect, be discharged.

9. Counsel for the defendant objected to the Second Amended Complaint and Warrant on the grounds set forth

in motions and objections heretofore made by counsel for the defendant in this proceeding to the previous Complaint, Amended Complaint, and Amendments thereto filed by the plaintiff and to the warrants issued thereunder. Such objections were overruled without prejudice.

10. Upon request made by counsel for the plaintiff, the Court directs the Clerk to release to counsel for plaintiff the English translation of the original extradition documents, for the purpose of making changes in said translation required by the review of said translation which has been under way by translators for plaintiff and defendant.

There being no further matters for the attention of the Court, the hearing was adjourned and the next hearing was set for 10 o'clock a.m. on Wednesday, March 30, 1960.

DONE AND ORDERED this 9th day of March, 1960.

/s/ WM. C. MATHES
United States District Judge

Filed Miami, Fla. Apr. 11, 1960, Julian A. Blake, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

ORDER ON PLAINTIFF'S MOTION FOR PERMISSION TO TAKE DEPOSITION OF CHEMICAL BANK NEW YORK TRUST COMPANY

Plaintiff having presented his motion, dated March 31, 1960, for permission to take the deposition of Chemical

Bank New York Trust Company, and the motion having been considered and submitted for decision;

IT IS ORDERED that the motion is hereby granted upon the same grounds and for the same reasons, and upon and subject to the same conditions as are set forth in the order of this Court, dated March 9, 1960, granting plaintiff herein permission to take the depositions of three other New York banks specified in said order; and all such provisions and conditions of said order of March 9, 1960, including the provisions therein as to reimbursement of the banks for unusual expenses, are hereby incorporated by reference herein.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

April 7, 1960.

WM. C. MATHES
United States District Judge

APPENDIX 3

Orders, Opinion, and Judgment of the United States Court of Appeals for the Fifth Circuit

Filed Jan. 20, 1960, Edward W. Wadsworth, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA,* Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Plaintiff,

versus

MARCOS PEREZ JIMENEZ, *Defendant*.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, *Petitioners*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

FORTUNATO HERRARA* and POLINVERSIONES, C.A., a Venezuelan Corporation, *Petitioners*,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

*"Aristeguieta" is misspelled "Aristequieta"; "Herrera" is occasionally misspelled "Herrara"; "Consul" is occasionally misspelled "Counsel"; and "Gutierrez" is occasionally misspelled "Guiterrez" on originals of orders, opinion and judgment of the Court of Appeals.

SILVIO GUTIERREZ, *Petitioner*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

Respondents.

Before RIVES, Chief Judge, JONES and BROWN, Circuit Judges.

PER CURIAM:

The appeal of the First National Bank of New York, the French American Banking Corporation, and the Royal Bank of Canada from an order of the United States District Court for the Southern District of Florida, Miami Division, denying a motion to quash three subpoenas duces tecum issued on behalf of the demanding country in the extradition proceedings first hereinabove styled is set for hearing and oral argument on the merits before this Court in the Courtroom in New Orleans, Louisiana, at 2:00 o'clock P.M. on January 27, 1960.

The motions for leave to file petition for writ of prohibition or mandamus or other petitions in the three cases last styled hereinabove, and any other motions or petitions in connection with said subpoenas duces tecum will be heard along with the argument on said appeal.

The parties may file typed briefs on or before the date of such hearing. Proceedings pursuant to said subpoenas duces tecum are stayed pending the final decision of this Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18176

MANUEL ARISTEQUIETA, Counsel* General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Plaintiff,

versus

MARCOS PEREZ JIMENEZ, *Defendant*.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, *Petitioners*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, *Petitioners*,

versus

MANUEL ARISTEQUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

SILVIO GUTIERREZ, *Petitioner*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

*"Aristeguieta" is misspelled "Aristequieta"; "Herrera" is occasionally misspelled "Herrara"; "Consul" is occasionally misspelled "Counsel"; and "Gutierrez" is occasionally misspelled "Guiterrez" on originals of orders, opinion and judgment of the Court of Appeals.

NAPOLEON DUPOUY, *Petitioner*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

Respondents.

PEDRO A. GUITERREZ* ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO,

Petitioners,

versus

MANUEL ARISTEQUIETA, Counsel General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Respondent.

Appeal from the United States District Court for the Southern District of Florida

and

Motions for Leave to File Petitions for Writs of Prohibition or Mandamus.

(February 1, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM: The appeal of the First National Bank of New York, the French American Banking Corporation,

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*"Aristeguieta" is misspelled "Aristequieta"; "Herrera" is occasionally misspelled "Herrara"; "Consul" is occasionally misspelled "Counsel"; and "Gutierrez" is occasionally misspelled "Guiterrez" on originals of orders, opinion and judgment of the Court of Appeals.

and the Royal Bank of Canada from an order denying a motion to quash three subpoenas duces tecum, issued on behalf of the demanding country in the extradition proceedings first hereinabove styled, and the motions for leave to file petitions for writ of prohibition or mandamus in all the other captioned causes, were argued and heard together. It was stipulated upon oral argument that final judgment might be entered as if leave to file the petitions for writ of prohibition or mandamus had been granted and those cases had been heard on the merits.

The court has carefully read and considered the briefs together with the oral arguments and has reached a conclusion. In view of the need for expedition, that conclusion is announced without opinion.

The court decides that the order denying motions to quash the subpoenas duces tecum is final and appealable. A majority of the court concludes that the said order should be reversed and the cause remanded with directions to quash the subpoenas duces tecum.

In view of the conclusions above announced, the petitions for the writ of prohibition or mandamus are denied.

The clerk is directed to enter judgments accordingly. Judge Rives thinks that the order should be affirmed, and, therefore, respectfully dissents.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Plaintiff,

versus

MARCOS PEREZ JIMENEZ, *Defendant*.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, *Petitioners,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, *Petitioners,*

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

SILVIO GUTIERREZ, *Petitioner,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

NAPOLEON DUPOUY, *Petitioner,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO,
Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

Appeal from the United States District Court for the Southern District of Florida

and

Motions for Leave to File Petitions for Writs of Prohibition and Mandamus

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Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court denying the motions to quash the subpoenas duces tecum in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to quash the subpoenas duces tecum; and that the petitions for writ of prohibition or mandamus are denied.

It is further ordered and adjudged that the appellants, The First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada recover their taxable costs in this Court from the appellee, Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

"Rives, Chief Judge, Dissenting."

January 29, 1960

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Plaintiff,

versus

MARCOS PEREZ JIMENEZ, *Defendant.*

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, *Petitioners,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, *Petitioners,*

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

SILVIO GUTIERREZ, *Petitioner,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

NAPOLEON DUPOUY, *Petitioner*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO,

Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Respondent.

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM:

The Motion filed on February 19, 1960 for Amendment of the Order entered on January 29, 1960 is hereby, Denied. February 24, 1960.

(Original Filed: February 24, 1960)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Plaintiff,

versus

MARCOS PEREZ JIMENEZ, *Defendant*.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, *Petitioners,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, *Petitioners,*

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

SILVIO GUTIERREZ, *Petitioner,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

NAPOLEON DUPOUY, *Petitioner,*

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO,
Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

On Motion to Dismiss the Appeals of Fortunato Herrera, Polinversiones, C.A. (a Venezuelan Corporation), Silvio Gutierrez, Napoleon Dupouy, Pedro A. Gutierrez Alfaro and Lola T. De Gutierrez Alfaro.

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM:

This Court intended to and did decide on January 29, 1960, all five appeals pending in this cause; that is, the joint appeal by the First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada, the appeal of Silvio Gutierrez, the appeal of Napoleon Dupouy, the appeal of Fortunato Herrera and Polinversiones, C.A., and the appeal of Pedro A. Gutierrez Alfaro and Lola T. de Gutierrez Alfaro. The Clerk is directed to issue a supplementary mandate so indicating. Since the appeals are no longer before this Court, the motion of Fortunato Herrera and Polinversiones, C.A. (a Venezuelan corporation), Silvio Gutierrez, Napoleon Dupouy, Pedro A. Gutierrez Alfaro and Lola T. de Gutierrez Alfaro to dismiss the appeal is DENIED.

Enter for the Court this the 25th day of March, 1960.

/s/ RICHARD T. RIVES
Chief Judge, Fifth Circuit

(Original Filed: March 28, 1960)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,176

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Plaintiff,

versus

MARCOS PEREZ JIMENEZ, *Defendant*.

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK of CANADA, *Petitioners*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

FORTUNATO HERRARA and POLINVERSIONES, C.A., a Venezuelan Corporation, *Petitioners*,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

SILVIO GUTIERREZ, *Petitioner*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

NAPOLEON DUPOUY, *Petitioner*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,
Respondents.

PEDRO A. GUITERREZ ALFARO and LOLA T. DE GUITTERREZ ALFARO, also known as LOLA T. DE GUITERREZ ALFARO,
Petitioners,

versus

MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent.

Appeal from the United States District Court for the Southern District of Florida

and

Motions for Leave to File Petitions for Writs of Prohibition or Mandamus

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Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

AMENDED JUDGMENT

IT IS ORDERED that the judgment of this Court entered on January 29, 1960 and issued on March 3, 1960 as and for a mandate be, and the same is hereby amended to read as follows:

This cause came on to be heard on all five appeals pending in this cause; that is, the joint appeal by the First National City Bank of New York, French

American Banking Corporation, and the Royal Bank of Canada, the appeal of Silvio Gutierrez, the appeal of Napoleon Dupouy, the appeal of Fortunato Herrera and Polinversiones, C.A., and the appeal of Pedro A. Gutierrez Alfaro and Lola T. de Gutierrez Alfaro, and on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court denying the motions to quash the subpoenas duces tecum in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to quash the subpoenas duces tecum; and that the petitions for writ of prohibition or mandamus are denied.

It is further ordered and adjudged that the appellants, The First National City Bank of New York, French American Banking Corporation, and the Royal Bank of Canada recover their taxable costs in this Court from the appellee, Manuel Aristequieta, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

"Rives, Chief Judge, Dissenting."*

March 25, 1960

(Original Filed: March 28, 1960)

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* Quotation marks in original.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18,276

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, *Petitioners*,

versus

THE HONORABLE WILLIAM C. MATHES, United States District Judge, and THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

Respondents.

ON MOTION FOR LEAVE TO FILE PETITIONS FOR WRIT OF PROHIBITION OR MANDAMUS

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM:

The propriety of the action of the district court referred to in the proposed petition for writ of prohibition or mandamus was not before this Court nor decided by it and is not contrary to the mandate in No. 18176,[1] decided Janu-

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[1] Styled, MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, vs. MARCOS PEREZ JIMINIZ; THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA, vs. THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION; FORTUNATO HERRERA and POLINVERSIONES, C.A., a Venezuelan Corporation, vs. MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela; SILVIO GUTIERREZ

ary 29, 1960. Leave to file the petition for writ of prohibotion or mandamus is therefore

DENIED.

Enter for the Court this the 25th day of March, 1960.

/s/ RICHARD T. RIVES
Chief Judge, Fifth Circuit

(ORIGINAL FILED: March 28, 1960)

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vs. THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION; NAPOLEON DUPOUY vs. THE HONORABLE WILLIAM C. MATHES, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUITTEREZ ALFARO, also known as LOLA T. DE GUTIERREZ ALFARO vs. MANUEL ARISTEQUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela.

APPENDIX 4

Excerpts From Published Materials Dealing With Marcos Perez Jimenez

The following material is a chronological compilation of excerpts from the New York Times and from Congressional publications, relating to the connection between the deterioration of United States-Latin American relations and the presence of Perez Jimenez in the United States.

"President Wolfgang Larrazabal said he would probably speak with Mr. Nixon about the presence of former President Marcos Perez Jimenez and his security police aide in the United States. He added: 'I would like it if the United States did not permit these two to live there.'" N. Y. Times, May 12, 1958, p. 3, col. 3.

"The Vice President's recognition of the fact that the presence in the United States of Venezuela's former dictator, Marcos Perez Jimenez, and his police chief, Pedro Estrada, is one of the main irritants underlining the seriousness of the anti-United States sentiment here three and one-half months after the dictatorship was overthrown.

"Mr. Nixon said that, in the light of an extradition treaty with Venezuela, the United States would be glad to take proper action and turn over General Perez Jimenez and Estrada if the Venezuelan courts requested it." N. Y. Times, May 14, 1958, p. 1, col. 5.

"A few days after the visit to Caracas of the oil mission, the United States announced that it had granted visas to General Perez Jimenez and Senor Estrada....

". . . the news was something of a bombshell. It handed the Communist party, which was busy reconstructing its apparatus and spreading its influence in universities, factories, unions and intellectual groups, just the issue it needed to set in motion an effective anti-United States campaign.

• • •

"The Communist party, armed with this propaganda manna from heaven, wasted no time in opening up with all its batteries. The United States, it argued, had again proved its hostility toward the people of Venezuela by providing a haven for General Perez Jimenez and thereby assisting him in his plans to stage a comeback.

• • •

"Many persons, particularly impressionable students, bought the Communist line lock, stock and barrel. The big Central University was well infiltrated by the Communists and, with the visa issue in hand, they had little trouble acquiring far-reaching support. . . .

• • •

". . . Mr. Nixon's promise that General Perez Jimenez and Senor Estrada will be extradited as soon as the Venezuelan courts complete their cases also went far to clear the atmosphere. But a concentrated effort on both sides will be needed to bring the relations back to where they were three months ago." Szulc, *Venezuela: Anti-U.S. Case History,* N. Y. Times, May 18, 1958, § 4, p. 14, col. 3.

"The issue was dramatized in Caracas, Venezuela, last Tuesday when a Communist-led mob attacked Mr. Nixon's car and fell just short of doing him bodily harm. It had been whipped to a frenzy by the allegations that the United States was aiding the former dictator, General Marcos Perez Jimenez and his police chief, Pedro Estrada, by having given them visas and haven." N. Y. Times, May 18, 1958, p. 1, col. 2.

". . . In Venezuela, the granting of asylum by the United States to ex-dictator Marcos Perez Jimenez and his police chief, Pedro Estrada—who was one of modern history's outstanding torturers and inquisitors—had a disastrous impact upon public opinion

and more than anything else it contributed to an explosion of anti-United States feelings." 104 Cong. Rec. 9428 (1958) (a reprint by Senator Mansfield of an article by Tad Szulc in the N. Y. Times, May 25, 1958).

"... The sorest point is that Perez Jimenez and Pedro Estrada, his secret police chief, both received visas for the United States. As one Venezuelan editor put it: 'Washington keeps out Charlie Chaplin the clown, but accepts Perez Jimenez and Estrada, the butchers.'

• • •

"The incredible asylum granted Perez Jimenez in these United States after his overthrow caused Vice President Nixon some trying moments in Caracas, we are told. Can we now wonder wide-eyed why the Venezuelan people are suspicious of our motives?

• • •

"... The readily obtainable facts about Perez Jimenez, former Venezuelan dictator, should be published and given to General Swing, the Immigration and Naturalization Commissioner, who then could easily and quickly boot him out of the country on an exclusion proceeding." 104 Cong. Rec. 9628-9630 (1958) (remarks by Congressman Porter.)

"... Now why did this happen? We must really get at the cause of it. This was because there happened to be in Venezuela at the time that we visited some real problems with regard to the relations between Venezuela and the United States. One of them was their feeling that the United States, both on the part of Government and as far as private enterprise were concerned, supported dictatorship, including the dictatorship of Perez Jimenez. Another was the feeling among many in Venezuela that we had made a mistake

in providing refuge for Perez Jimenez, and the head of the Venezuelan Police, Estrada." 104 Cong. Rec. 9700 (1958) (reprint of address by Vice President Richard M. Nixon before the National Press Club, May 21, 1958).

"I think that there is a considerable feeling of popular resentment, shall we say, in Venezuela, about Perez Jimenez being in the United States.

• • •

"Yes; under the terms of our Extradition Treaty of 1922 we have been prepared right along [to proceed with extradition]. We have stated that repeatedly from the time the subject was first brought up and it was repeated in very forceful terms by the Vice President when he was in Caracas." Hearings Before the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs, 85th Cong., 2d Sess. 16-17 (1958) (testimony by Roy R. Rubottom, Jr., Assistant Secretary of State for Inter-American Affairs).

"The established centers of university students issue the following declaration on the coming visit of Mr. Richard Nixon, Vice President of the United States of America:

"Considering him:

• • •

"(c) Representative of a policy that did not hesitate in giving asylum and protection to the assassins of the Venezuelan people, Perez Jimenez and Pedro Estrada.

• • •

"Declare Mr. Richard Nixon as an undesirable visitor in the fatherland of Simon Bolivar." *Id.* at 134 (translation of an article in Ultimas Noticias of Caracas, May 11, 1958).

"We cannot forget the complacent attitude with which the United States supported Perez Jimenez and his clique, an attitude which is maintained in giving asylum and protection to same in the United States disregarding the unanimous protest of democratic opinion in America." *Id.* at 136 (translation of an article in La Esfera of Caracas, May 13, 1958).

"The pent-up feelings exploded with a tremendous shock when Vice President Nixon made his now famous trip to South America in April and May, 1958. Virtually all students of Latin American affairs agreed at the time that Mr. Nixon drew the right conclusion from his experience—that the hostility was not directed against him personally but against United States policies toward the region, especially economic policies, and the favoritism shown toward Latin-American dictators.

• • •

"The Nixon concept is based on a recognition of the fact that, without a spirit of cooperation, mutual respect and friendship, Latin America—or some countries in the area—could withdraw toward neutralism or an aggravated Yankeephobia. A negative attitude of that type is as much to be feared as a positive and favorable attitude is to be desired. In either case, one must start from the premise that Latin America is of enormous—perhaps even vital—importance to our continued existence as a free and prosperous nation.

• • •

"The area is passing rapidly from an underdeveloped agrarian and mineral economy into an industrial revolution. The strongest feature of Latin American affairs today is social revolution, to which, in recent years, is linked the tidal wave of democracy that has swept most of the region's dictators awa . It stands to reason that such an area is politically unstable, in

a social ferment and emotionally sensitive. In other words, it is potentially a fertile field for Communism.

• • •

"Perez Jimenez, one of the most brutal and predatory dictators in Latin American history, is a reminder of another great and bitter Latin American complaint—United States favoritism toward dictators." Matthews, *Why Latin America is Vital to Us,* N. Y. Times, April 26, 1959, § 6 (Magazine), p. 17.

"There is reason for real concern over the penetration that Communists have made in certain Latin American intellectual circles and, particularly, in student bodies.

. . .The intellectual field, in all its many ramifications, still represents, in my opinion, the main immediate goal of the Communists south of the Rio Grande. . . . The Communists (in Venezuela) were able to build upon the students' strong resentment over the fact that Perez Jimenez and Chief of Police Pedro Estrada were granted visas to enter the United States.

"Under their reign, the University of Caracas had been closed for many months, while hundreds of students were arrested and tortured by the secret police." Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. 128 (1959). (Statement by Serafino Romualdi, Inter-American representative of the AFL-CIO).

"The case of the unwanted dictator of Venezuela, General Perez Jimenez, entered a new phase on Tuesday. The former military ruler, one of the most discredited figures in Latin America, was arrested by United States marshals in Miami and held several hours until he appeared before Judge Emmett C. Choate of the Federal district court. The legal cause was a com-

plaint filed by the Venezuelan Consul in Miami on behalf of his Government asking for the extradition of General Perez Jimenez on charges of murder, attempted murder and embezzlement. On putting up a $25,000 bond the general was released pending formal hearings on the Venezuelan charges.

"This is a real *cause celebre* all over the hemisphere. For one thing, the central figure was an example of the worst type of Latin-American military dictator. His regime was almost incredibly corrupt and its brutality was such that it could only be characterized as horrifying. It so happens that the United States record of friendliness to the dictatorship, especially under the Ambassadorships of Fletcher Warren and Dempster McIntosh, makes the case the most often quoted example of favoritism in this field." Editorial, N. Y. Times, August 27, 1959, p. 26, col. 2.

"Giving asylum in Miami, Fla., to a Venezuelan dictator whose ruthless regime has been overthrown by the Venezuelan people is propaganda fodder for the Communists' representation that the United States prefers dictators friendly to American business interests abroad rather than democratic administrations seeking to improve the economic welfare of the mass of the people in Venezuela." Report of Senator Wayne Morse on a Study Mission to the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 3 (1960).

"It is important to the United States that responsible representative government succeed in Venezuela. One of the complaints which is frequently heard about the United States in Venezuela and elsewhere in Latin America is that it views liberal reform governments askance and does not really care about social progress. This complaint is often exaggerated, but it is believed by many people. Here in Venezuela is a chance to

demonstrate that the reverse is true and that the United States in fact has far more in common with democrats like Betancourt than with dictators like Perez Jimenez." Report of Senator George D. Aiken on a Study Mission to the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 6 (1960).

APPENDIX 5

Excerpts From Proceedings of the Juridical Committee and Executive Committee of the 48th Conference of the Interparliamentary Union

The following is the text of the motion presented by the Venezuelan Group to the Juridical Committee of the 48th Interparliamentary Conference:

"The Venezuelan Delegation to the 48th Interparliamentary Conference, carrying out the profound desire of the Venezuelan people and of the Venezuelan Parliament, and echoing the sentiments of other peoples and parliaments of Latin-American countries, formally request that a study be made of the desirability of including in the agenda of the next meeting the following question:

"That the Conference of the Interparliamentary Union make an appeal to all the national groups for the purpose of encouraging in the legislative field, in international negotiations, and in the conscience of their respective peoples and governments, a common attitude based on principles of Justice and Law, in order to prevent public funds, misappropriated in any State by those in power through the abuse of said power, from being enjoyed with impunity and under guarantees in the territory of another State.

"The legal and moral reasons for this proposal are obvious. Since money obtained through crime is not protected for the benefit of the criminal in any civilized country, funds resulting from abuse of power, causing harm, not to a private citizen but to the whole people, cannot enjoy a privilege which would be both insulting and immoral.

"The historical reasons are even of a more serious nature. In all the Continents, and particularly in Latin America due to the direct experience we have had, men have appeared who, in violation of all human rights and against the will of the citizens, have accumulated huge fortunes for themselves, and have assured their enjoyment thereof by timely transfers of such fortunes to foreign countries. Among those

other countries there are some that take just pride in their democratic institutions and in their respect for the Law, nevertheless they serve as a haven for crime when they offer asylum to actual criminals in the guise of legitimate and honorable investors. Such a situation outrages the feelings of the peoples that have been despoiled, while it undermines the common faith in democracy, which would be only a sham if the laws and those responsible for their application did not sincerely support its principles.

"We request that the Juridical Committee recommended to the Executive Committee that this question be considered, so that at the next meeting of the Conference a draft resolution from our delegation may be taken up, after due discussion within the Latin-American Parliamentary Group which must precede the 49th Conference.

"(Signed) RAFAEL CALDERA
"Warsaw, August 31, 1959"

The following are extracts from the Minutes of the meeting of the Juridical Committee at Warsaw, September 4, 1959:

"*Mr. Touron Lugo* (Secretary of the Venezuelan delegation) read out a draft resolution presented by his Group in the following subject: 'Appeal to the National Groups to take Measures against the Ill-Usage (malversation) of public funds'.

"*The Chairman* asked the Venezuelan delegation to give a proper title to their proposal.

"*Mr. Touron Lugo* asked for time to discuss the matter with his colleagues.

"*The Chairman* proposed a short adjournment so that the Venezuelan delegation could study the title

of their resolution and so that the Committee could examine the questions already on the agenda.

• • •

"*Mr. Cardoso* (Brazil) said that the problem of the theft of public funds by dictators was extremely grave in Latin-American Republics. He cited concrete examples in this respect. The theft of public funds by dictatorial Governments was a frequent occurrence. As a result, many countries in Asia and America were constantly being impoverished. It was a question that should be studied by the Inter-Parliamentary Union.

"*The Chairman* supposed that Mr. Cardoso had been referring to the Venezuelan proposal on the illegal self-enrichment of Government officials and suggested a vote on the subject.

• • •

"*Mr. Douglas,* Assistant Secretary, said that the three items already approved were those dealing with juvenile delinquency, education against war and human rights. The Soviet delegation had suggested these and had been supported by Mr. Bowen of Great Britain. A fourth one, the Venezuelan question, could now be added.

"*The Chairman* asked whether the members agreed to the Venezuelan question being added to the agenda.

"*Mr. Ribiere* (France) thought that this was a question falling within the scope of private international law rather than of international law proper.

"*Mr. Cardoso* (Brazil) thought that the recommendations of the Union could bear on both fields.

"*Mr. Moreno Figueroa* (Peru) supported the Venezuelan proposal and cited the thefts by Battista, Peron, etc.

"*The Venezuelan proposal was accepted by 10 votes to nil, with 3 abstentions.*"

The following are extracts from Minutes of the meeting of the Executive Committee at London on December 16 and 17, 1959:

> "With regard to the agenda of the Juridical Committee, *Mr. Braga* was of the opinion that the topic proposed by the Venezuelan Group, to which reference had already been made, was of more interest to parliamentarians of the Americas than to those of other countries and that it might therefore be more appropriate to recommend this point for insertion in the agenda of the next regional conference in Santiago.
>
> "*It was so agreed.*
>
> "*The President* opened the meeting at 10:15 a.m. and read out the text of a cable which had just been received from Mr. Rafael Caldera, the Vice-President of the Venezuelan Group. This requested consideration of the agenda item proposed by the Venezuelan Group at the Warsaw Conference. Mr. Codacci-Pisanelli reminded members that this question had been discussed at the previous day's meeting when it had been decided that the particular topic proposed would be more suitably discussed at the Santiago regional conference in 1960. He suggested therefore that Dr. Caldera should be informed accordingly.
>
> "*It was so agreed.*"

The materials in Appendix 5 were obtained by correspondence between the attorneys for petitioner and Mr. James Douglas, Assistant Secretary General, Union Interparlementaire, 6 Rue Constantin, Geneva, Switzerland.

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IN THE

Supreme Court of the United States

October Term, 1959

No.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

vs.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ, NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Argument in Opposition to Reasons for Granting the Writ.

The petitioner in his Petition for a Writ of Certiorari sets forth his reasons why this Court should review the decision below. The Petition fails, however, to set forth valid reasons of consequence which are necessary to invoke the discretionary appellate power of this Court.

The first reason set forth by the petitioner is, in essence, that since the Court of Appeals decided an issue contrary to the contentions of both parties to a Treaty of Extradition, this Court must review such decision.

Such contention on the part of the petitioner completely ignores the position of the other parties in interest in the proceedings below. It is to say that the accused has no rights whatsoever. The petitioner himself recognizes such rights, however, in his own brief at page 22 of the Petition wherein he states that the extradition proceeding involves adverse litigants with real and substantial adverse interests. It is further to say that innocent third parties whose affairs are to be scrutinized and examined without limitation have no rights. This stated reason would, *a fortiori,* justify this Court in denying the Writ.

Next the Petition cites as a reason for granting the Writ the fact that the United States is a party to sixty-five bilateral Treaties of Extradition and a multilateral convention on extradition, and that if the decision below were allowed to stand the United States would become a haven for fugitive criminals from abroad and a notorious place for the concealment of their crimes. It is hardly necessary to point out that the United States has for a great many years been a party to international extradition treaties and that its performance under such treaties has hardly caused it to be considered a haven for foreign criminals or a notorious place of concealment of evidence of their crimes. It should be pointed out, however, that this cited reason completely ignores the fact that international extradition is concerned with the surrender of individuals for trial on charges of crimes committed elsewhere. The demanding country has full and ample opportunity to obtain the necessary evidence of guilt in its own jurisdiction and in accordance with its own procedures. To deny to such demanding nation the

right of court-empowered discovery in the nation of asylum hardly affects the treaty rights of such demanding nation. If a demanding nation cannot obtain such evidence of guilt in its own jurisdiction as may be necessary to justify the accused's detention (as distinguished from establishing his guilt), such nation should certainly not be entitled to extradition for the purpose of trial. See Article I of the Treaty with Venezuela, 43 Stat. 1698, Appendix 1, page 1, of Petition. This is particularly true in this case where the counsel for the petitioner in proceedings below has admitted that the petitioner's case in chief would rest on documents already a part of the record, and that the additional evidence sought by the attempted *subpoena duces tecum* would not be used for that purpose. See Appendix 2 to this brief. It would manifestly appear, therefore, that the petitioner seeks such additional evidence as an aid to the establishment of guilt in a Venezuelan trial and not as an aid in justifying detention and commitment for trial as is the function of the extradition hearing. There can be no doubt that the judicial processes of the asylum nation are not available for such purpose.

The petitioner next contends that this Court should settle the question of whether or not the so-called all-writs statute, 28 U. S. C. Section 1651, confers subpoena power upon the extradition "judge" in an extradition proceeding. No confusion exists here. There is no doubt but that *American Lithographic Company v. Werckmeister*, 221 U. S. 603, establishes that 28 U. S. C. Section 1651 includes the subpoena power. What the petitioner fails to recognize, however, is that this statute confers its power on the *courts* and not on the "commit-

ting magistrates" in a non-judicial proceeding. 18 U. S. C. Section 3184 provides *inter alia* that the accused is to be brought before "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." Hence, the "committing magistrate" as such acting official has come to be known (See, *e.g., Benson v. McMahon,* 127 U. S. 457, 463; *Charlton v. Kelly,* 229 U. S. 447, 460; *Collins v. Loisel,* 259 U. S. 309, 315-317.) does not necessarily have to be a United States justice or judge. He may be a judge of a State court of general jurisdiction. Could it be said in such latter case that such State court judge could invoke the power granted to the United States courts by 28 U. S. C. Section 1651? It is, therefore, apparent that the mere fact that the "committing magistrate" in this case happens to be a United States District Court judge does not confer on him the power of that court under such section. He must confine himself to such powers as are specifically granted to him as "committing magistrate."

In his reason numbered "Third" petitioner states that the decision below appears to conflict with accepted practice in extradition proceedings in that it might be bottomed on the argument of respondents below that evidence to be presented by the demanding nation in an extradition proceeding is limited to that upon which the accusation is based. This cannot possibly be the basis of the Court of Appeals decision for if it were the discovery proceedings for which the "committing magistrate" gave his permission by order dated March 9, 1960 would have been contrary to the mandate of the decision of the Court of Appeals, and the respondent's Petitions for

Writ of Prohibition or Mandamus with respect to such order would have been granted instead of denied. (See Appendix 2, p. 31, and Appendix 3, p. 15, of Petition.)

The Petition next contends that the decision below is inconsistent with a liberal construction of treaties of extradition. Respondent does not deny that *Factor v. Laubenheimer*, 290 U. S. 276, establishes such a rule of construction. Respondent does deny, however, that liberality of construction permits construction out of context. The petitioner contends that one sentence contained in Article XI of the Venezuelan Extradition Treaty empowers the "committing magistrate" to establish rules of procedure and substance in an extradition proceeding. That sentence is as follows: "The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested."[1] (43 Stat. 1698, 1704.) The paragraph from which this sentence has been lifted reads as follows:

> "It shall be competent for such diplomatic or superior consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested."

(See Appendix 1, p. 1, of Petition.) This entire paragraph is obviously referring to the procedures of the demanding nation in asking for and obtaining the

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[1]It is to be noted that the petitioner's method of quoting this sentence in its Petition at page 15 thereof indicates an omission therefrom when in fact none exists. See Appendix 1, p. 1, of Petition.

preliminary arrest of the person whose surrender is requested. The judicial functionaries referred to are those of the demanding nation, not those of the asylum nation. A proper reading of this paragraph requires such a construction. Even if it were otherwise the sentence makes reference to *complying* with "legal formalities," not *establishing* legal procedures as the petitioner would have this Court believe. It is also to be noted that when the Treaty in question refers to the judges of the country of asylum it uses the expression "a judge or magistrate" (Art XII) or "judges and magistrates" (Art. XIII). (See Appendix 1 hereto.) It does not refer to them as "judicial functionaries."

The petitioner's last citation of reason for granting the writ refers to the decision of the Court of Appeals with reference to the position of the depositors. The Petition erroneously concludes that the decision below, insofar as it relates to the appeal of the depositors, must be based on the depositor's property interest in the bank records of their accounts or on a privilege between bank and depositor. Indeed, the petitioner would have this Court believe that a depositor has no standing to object whatsoever. This is not true, however. In *Foster v. United States,* 265 F. 2d 183 (2d Cir., 1959), *Certiorari denied,* 360 U. S. 912, the concurring opinion of Judge Lumbard clearly illuminates the implied holding of the majority opinion to the effect that a bank depositor has a standing to object to a subpoena of the records of his deposit accounts with the bank, which standing is completely independent of the bank.

Further, the petitioner's contention here completely ignores the depositor's right to object to that which is completely void. The petitioner would have this Court be-

lieve that the bank depositors are complete strangers to the proceedings below, but to use the language of Judge Moore in an analogous situation, calling a depositor "a 'stranger' carries technical legalism beyond its outside limits." *United States v. Guterma*, 272 F. 2d 344, 345 (2d Cir., 1959). There can certainly be no doubt that this respondent is affected by the broad sweep of the *subpoenas duces tecum* which were issued by the District Judge and ordered quashed by the Court of Appeals below. These *subpoenas duces tecum* sought the production of all of the records of two banks having reference to the accounts of this respondent over an approximate ten-year period. The records sought are not just those which might relate to the accused in the extradition proceeding, but to all records relating to the respondent's accounts. Indeed, it was the broad scope of these *subpoenas duces tecum* which prompted this respondent to move to quash them. It is one thing to say that this respondent cannot be heard to object on the grounds of relevancy or privilege to that which is otherwise valid, but yet another thing to say that he cannot be heard to object to that which is completely void. Before the issuance of the *subpoenas duces tecum* in question, this respondent was a "stranger" to the extradition proceedings, but to say that he continues so after the issuance of these subpoenas for the purpose of denying him the right to object to their validity is to torture technical legalism beyond recognition.

The decision below is not, therefore, necessarily in conflict with other decisions of the Fifth Circuit or other courts of appeal. (See *Foster v. United States, supra.*)

Reasons for Denying Summary Reversal.

The respondent cannot believe that the petitioner seriously urges this Court to summarily reverse the Court of Appeals below. The Petition has gone to great length to point out that the decision below creates an unsettled state of the law with respect to a number of issues, and further that such issues are of great importance and that, therefore, this Court should review the decision below. It is obviously inconsistent with such contentions to then ask this Court to summarily reverse the decision below on the basis of the papers now before it.

This respondent does not question that this matter should be dealt with with "all deliberate speed," but at the same time does contend that matters of vital interest to him and to others are here at stake, and that such matters must not be sacrificed in the interest of speed.

The petitioner further asks this Court to summarily reverse the decision below for the purpose of improving international relations between this country and Latin American countries. It is undoubtedly unnecessary to point out here that international relationships fall within the scope of the duties of the executive branch of our government and not within those of the judicial branch. The improvement of international relations is, of course, to be desired, but such improvement should not be at the expense of a summary consideration of the rights of individuals.

Additionally, the decision below should not be summarily reversed for the simple reason that it is a correct decision. It is true that the Court of Appeals below did not cite its reasons in making its decision. The decision

below is, however, supportable on the simplest of reasons and it is not necessary for this Court to consider some of the more complex reasons which the petitioner seems to attribute to the Court below. The decision below is supportable on the simple ground that the District Judge, sitting as a commiting magistrate in an extradition proceeding, did not have the power to issue subpoenas outside the 100-mile limit established by Rule 45(e)(1) of the Federal Rules of Civil Procedure. As has been stated previously herein, the so-called all-writs statute, 28 U. S. C. Section 1651, does not confer subpoena power on a committing magistrate in an extradition proceeding, and it is specifically provided that the unlimited subpoena power in criminal proceedings does not apply to extradition proceedings. Fed. Rules Cr. Proc., Rule 54(b)(5), 18 U. S. C.

The respondent, therefore, respectfully urges this Court that the petitioner's prayer for summary reversal be denied.

Argument in Opposition to Summary Reversal.

The respondent has in the foregoing sections of this brief argued in opposition to the specific reasons propounded by the petitioner in seeking a Writ of Certiorari. Further, it is the understanding of this respondent that the respondents, The First National City Bank of New York, French American Banking Corporation, and The Royal Bank of Canada, will jointly file a brief in opposition in which the arguments set forth in the petition in support of the petitioner's prayer for summary reversal will be specifically met and opposed. This respondent will not burden this Court with a duplication of such arguments herein. Suffice it to state here that this respond-

ent contends (1) that the function of the committing magistrate in an extradition proceeding is not judicial in nature, (2) that the committing magistrate does not obtain subpoena power from 28 U. S. C. Section 1651, the so-called all-writs statute, (3) that the United States District Court does not have the power to issue a subpoena in aid of the jurisdiction of the committing magistrate, (4) that the extradition statute and treaty do not presuppose a subpoena power in an extradition case, and (5) that in the alternative if a subpoena power does exist, it is limited by the 100-mile limitation contained in Rule 45(e)(1) of the Federal Rules of Civil Procedure.

There follows, however, a brief statement of the grounds on which this respondent relies in opposition to the argument advanced by the petitioner in Section III of his Petition, at page 41 thereof, wherein he contends that the depositors can advance no ground to quash the subpoenas.

The issue at this particular point is not whether a depositor has a property interest in the records of his bank, or is a creditor of the bank; and it is not whether a privilege (to prevent compulsory disclosure) exists merely because of the depositor-bank relationship. The sole issue here is whether the depositors have standing to object on the grounds which they do in fact present.

Petitioner's implied premise—a depositor has no property interest in the records of his bank, *ipso facto* he has no standing in court to raise any ground whatsoever when the bank's records of his account are sought—is not supported by the cases he cites, and, indeed, is contrary to one of them. *Foster v. United States, supra*, held that a depositor does have standing in court under these facts to make objections on *some* grounds. The depositor in

that case apparently urged[2] that the subpoena constituted an unreasonable search as to the person served (the bank) and the Court answered that ". . . the appellants lack standing to raise *that* objection." (265 F. 2d at pp. 187-188) (Emphasis added). However, the depositor did have standing to raise other objections, as was noted in the concurring opinion.

Other cases cited by petitioner do not hold that a depositor has no standing to be heard. Rather, they hold only that, "[t]he Fourth Amendment does not guarantee to a person security against search, reasonable or unreasonable, in papers which are not that person's property and are not in his possession." (*In re Upham's Income Tax*, 18 Fed. Supp. 737, 738 (S. D. N. Y., 1937)); that, ". . . a third party is not entitled to invoke the protection of the Fourth Amendment. . . ." (*Zimmerman v. Wilson*, 105 F. 2d 583, 586 (3rd Cir., 1939)); and that a depositor has no property interest in the records of his bank.

McMann v. S. E. C., 87 F. 2d 377 (2d Cir., 1937), *cert. den.* 301 U. S. 684, likewise involved only the question of Fourth Amendment protection against unreasonable search and seizure, while in the case of *United States v. Peoples Deposit Bank & Trust Co.*, 112 Fed. Supp. 720 (E. D. Ky., 1953) *aff'd per cur.* 212 F. 2d 86 (6th Cir., 1954) the question of a depositor's standing to object was not an issue.

Petitioner has confused two separate and distinct problems in his citation of the cases on privilege (p. 43 of the

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[2]The cases cited by the Court at page 187 involve unreasonable search and seizure as a ground of defense by the person served with the subpoena.

Petition). He has failed to distinguish the question of *grounds* of objection from the question of *who may raise those grounds, i.e.,* standing. These cases do not purport to say that a depositor has no standing to object, but hold only that the ground urged, *i.e.,* privilege by virtue of the relationship, is not a valid ground.

Petitioner would have us believe that he is entitled to engage in a fishing expedition without regard to the rights of others. He does not indicate the catch sought, but only the bait proffered—better relations between Venezuela and the United States. He seeks to pry into the financial affairs of these depositors albeit those affairs are totally and entirely unrelated to the extradition proceeding against Marcos Perez Jimenez. He urges justice on behalf of the people of Venezuela, but would deny these depositors their day in court.

It is one thing to grant a right of discovery of the private transactions of a third person when a need therefor is shown, but surely that does not establish the existence of such a right without regard to need. The orders of the District Court were of full scope and did not limit discovery to those financial transactions of the depositors that related to Mr. Jimenez.[3] Petitioner would support these orders by a citation from Wigmore to the effect that a witness may not question relevancy. Petitioner's argument applies a basically sound doctrine to an inappropriate factual situation, as the present problem is

---

[3]Suppose the petitioner had obtained a *subpoena duces tecum* to procure discovery of the bank account of A.B. in the X Bank and the account had no bearing on this extradition proceeding. Certainly A.B. would have standing to object; yet, this same situation is present in the instant case to the extent of all transactions which do not involve or concern Mr. Jimenez, and petitioner would have this Court deny the depositors a chance to object.

deeper than the technical concept of relevancy. Indeed, Wigmore recognizes that a party desiring certain evidence is not the only one with rights at stake, and that rights of other parties require protection against infringement. Speaking of a satisfactory method of protecting a third party's rights, Wigmore says:

> "It is his duty to bring what the Court requires; and the *Court* can then to its own satisfaction *determine* by inspection whether the documents produced are irrelevant or privileged. This does not deprive the witness of any rights of privacy, since the Court's determination is made by its own inspection, without submitting the documents to the opponent's view. . . ." (VIII Wigmore, *Evidence*, §2200 (3d Ed. 1940).)

Who, then, is the proper party to assert these rights and to object to the infringement thereof? Certainly not the accused below, for he is not injured by compulsory disclosure of matters unrelated to him; nor are the banks injured thereby. It is *only* the respondent whose rights are being infringed upon and *only* the respondent who is the proper party to object thereto.

This argument applies with even greater force to the right of the respondent to object on the ground that the subpoenas are void by reason of a lack of power on the part of the official issuing them. A refusal of the courts to even hear such objection would create a grievous wrong.

Respectfully submitted,

WILSON B. COPES,

WELLMAN P. THAYER,

WILLIAM L. KUMLER,

Attorneys for Respondent Napoleon Dupouy.

APPENDIX 1.

The Extradition Treaty of Janary 19, 1922, between the United States and Venezuela, 43 Stat. 1698, contains in part the following provisions:

"Article XII

"If when a person accused shall have been arrested in virtue of the mandate or preliminary warrant of arrest, issued by the competent authority as provided in Article XI hereof, and been brought before a judge or a magistrate to the end that the evidence of his or her guilt may be heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent to hold the accused for a period not exceeding two months, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused, and if at the expiration of said period of two months such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released, provided that the examination of the charges preferred against such accused person shall not be actually going on."

"Article XIII

"In every case of a request made by either of the two Contracting Parties for the arrest, detention or extradition of fugitive criminals, the legal officers or fiscal ministry of the country where the proceedings of extradition are had, shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every legal means within their or its power; and no claim whatsoever for compensation for any of the services so rendered shall be made against the Government demanding the extradition, provided, however, that any officer or officers of the surrendering Government so giving assistance who shall, in the usual course of their duty, receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the Government demanding the extradition the customary fees for the acts or services performed by them, in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers."

APPENDIX 2.

Excerpts From a Hearing on a Motion Argued Before the Honorable William C. Mathes Held on March 7 and 8, 1960.

(a) Mr. Westwood, Counsel for the Consul General, pointed out that the documents sent from Venezuela were still in process of being translated from Spanish, and said [Tr. p. 377]:

> "There are some 2,000 pages of English translation which have been involved."

He stated that all the material would be ready about March 30, 1960. The following colloquy took place [Tr. p. 380]:

> "The Court: Would that mean that the plaintiff would rest upon the record?
>
> Mr. Westwood: That is right.
>
> The Court: Your case in chief?
>
> Mr. Westwood: That's right, your Honor."

(b) Later Mr. Westwood added [Tr. pp. 381-382]:

> "So that what we have in mind, then, is a submission by March 30th of our case in chief in the form that I have indicated."

(c) Thereafter the following colloquy ensued [Tr. pp. 392-393]:

> "The Court: I understand that the plaintiff expects to rest upon the record made upon these translations. Am I correct in that?
>
> Mr. Westwood: That is right, your Honor.
>
> The Court: And then you will put the defendant to any defense he wishes to make, and if any additional evidence by way of rebuttal is available, you will use it."

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Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

BRIEF FOR RESPONDENT, SILVIO GUTIERREZ, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1959

No.

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

BRIEF FOR RESPONDENT, SILVIO GUTIERREZ, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Case

Silvio Gutierrez, the respondent herein, moved below to quash a subpoena *duces tecum* directed to his private records and accounts with the Chemical Bank New York Trust Company in New York City.

Said subpoena was issued by the United States District Court for the Southern District of Florida in proceedings for the extradition to Venezuela of the respondent Jimenez.

instituted in said District Court by a complaint which alleged "That sufficient cause had been established for the arrest and trial of the defendant" (Jimenez), by the decree of the Federal Court of Venezuela of July 30, 1959, and that "considerable excerpts from the evidence that was before the Federal Court" are contained in the extradition documents.

No issue exists with respect to the identity of the person whose surrender is demanded, and no claim is made that the extradition documents are insufficient in any respect to establish probable cause as to the commission of the crimes charged. These are the limited functions of an extradition hearing (*Charlton* v. *Kelly*, 229 U. S. 447, 461 [1913]).

The United States Court of Appeals for the Fifth Circuit acted upon the appeal of Silvio Gutierrez from an order of the District Court denying the motion to quash the subpoena *duces tecum*, thus sustaining his standing, reversed the order appealed from, and remanded the case to the District Court with directions to quash the subpoena *duces tecum*.

The extradition proceedings are still pending, although the demanding country has submitted all its evidence with the exception of depositions of the respondent banks as ordered by Chief District Judge Ryan on May 16, 1960, in the United States District Court for the Southern District of New York, on the basis of orders entered in the Florida District Court, and the demanding country has not shown that it has been, or will be, prejudiced by the said action of the Court of Appeals for the Fifth Circuit.

ARGUMENT

The petition for the writ is without merit. The questions presented are of no public importance and relate to matters which may easily be regulated by treaties and by legislation.

There is no right of subpoena by a demanding government under the present treaty between Venezuela and the United States (43 Stat. 1698) and existing legislation and Court rules (18 U.S.C. §§ 3181-3195; Rule 54(b)(5), Federal Rules of Criminal Procedure; Rules 1, 26, 81, Federal Rules of Civil Procedure). In any event the subpoena was invalidly served more than 100 miles from the place of hearing (Rule 45(e)(1), Federal Rules of Civil Procedure).

There is no conflict between the decision below and any decision of this Court or of other courts of appeals.

A

Procedures in extradition matters are exclusively governed by congressional enactment (18 U.S.C.; §§ 3181-3195) and by treaty (Treaty with Venezuela, 43 Stat. 1698). Due process requires that the actions of the demanding country shall be limited to the existing provisions in such laws and shall not be extended by reason of any compilation of excerpts from newspapers or other publications (Appendix 4 of the present petition).

Any extension of existing procedures can be established only through further congressional enactment or other treaties.

Nothing in the said Treaty with Venezuela or in the above mentioned statutes gives the demanding country the right of subpoena or discovery. This right cannot be created by the Federal Rules of Criminal Procedure which are expressly inapplicable by their very provisions (Rule 54(b)(5)).

Extradition proceedings are not "suits of a civil nature" (*Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 271 [1935]), and, therefore, Rules 1 and 26 of the Federal Rules of Civil Procedure exclude extradition proceedings from their provisions. Nor does Rule 81 of said Rules, which states to what proceedings they are applicable, list extradition proceedings. Nor is there inherent power in the Federal Court to issue subpoenas (*Janssen* v. *Belding-Corticelli*, 84 F. 2d 577, 578 [1936]; *Perkins* v. *Endicott Johnson Corporation*, 128 F. 2d 208, 215 [1942]; affd. 317 U. S. 501, 63 S. Ct. 339; *Bowles* v. *Bay of New York Coal & Supply Corp.*, 152 F. 2d 330, 331 [1945]), and especially not in an extradition proceeding which is extremely limited in purpose (*Charlton* v. *Kelly*, 229 U. S. 447, 461 [1913]) and is a non-judicial proceeding (*United States* v. *Ferreira*, 13 How. (54 U. S.) 40 [1851]; 4 Op. Atty. Gen. 201).

B

A depositor has standing to be heard with respect to any violation of due process, any act of unlawful search and seizure, any extortion of testimony or any compulsion to act as a witness against himself, all of which is violative of, and forbidden by, the Fourth and Fifth Amendments of the Constitution (*Perlman* v. *United States*, 247 U. S. 7; 38 S. Ct. 417, 420 [1918]; *McMann* v. *Securities & Exchange Commission*, 87 F. 2d 377, 379; cert. denied 301 U. S. 684, 57 S. C. 785 [1937]; *Foster* v. *United States*, 265 F. 2d 183; cert. denied 360 U. S. 912, 79 S. C. 1297 [1959]).

C

Every other consideration notwithstanding, the subpoena *duces tecum* herein was invalidly served, since it was served upon a bank in New York City, more than 100 miles from Miami, Florida, the place of hearing (Rule 45(e)(1) Federal Rules of Civil Procedure). Since the Federal Rules of Criminal Procedure do not apply to extradition proceedings (Rule 54(b)(5)), no reliance can be had upon Rule 17(e)(1) thereof.

Conclusion

No real need exists for a demanding country to obtain the benefits of discovery or subpoena *duces tecum*, since it is free to engage in all methods of discovery permitted by the laws where the crime was committed, and to present authenticated documents showing the evidence obtained, which are admissible as evidence in the extradition proceeding (18 U.S.C. § 3190). Therefore, there is not involved here any question of Federal Law which should be settled by this Court. The decision below is in full accord with the accepted and usual course of proceedings for extradition and is in thorough accord with applicable decisions of this Court, and is not in conflict with any decisions of other Courts of Appeals.

The petition does not present a matter requiring a review on certiorari within the considerations set forth in Rule 19 of the Rules of this Court, and the petition for certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 892

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, PETITIONER

v.

FIRST NATIONAL CITY BANK OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Though not subscribing to all of the statements as to historical and current events made in the petition, the United States does join with petitioner in urging that this Court grant a writ of certiorari to the Court of Appeals for the Fifth Circuit to determine whether a judge of a United States District Court has the power to issue a subpoena at the request of the demanding government in an extradition proceeding, and whether, if such power exists, its exercise is subject to the 100-mile limitation on the service of subpoenas contained in Rule 45(e)(1) of the Federal Rules of Civil Procedure.

INTEREST OF THE UNITED STATES

The interest of the United States is not confined to the individual problem posed by this particular litigation but is broader in scope, encompassing general considerations of considerable international importance. Of primary concern is the responsibility of this Government to honor the stipulations of its treaties with friendly nations regarding the mutual extradition of fugitives, and its ability to comply faithfully with its international commitments in this regard.[1] Furthermore, the recognition by our courts of the power of compulsory process would enable the United States to expect a liberal construction of local laws when demanding the return of a fugitive from a foreign land to this country.

In addition, the treaty with Venezuela involved in this case imposes upon the United States the obligation of assisting the officers of Venezuela in an extradition proceeding "by every legal means" within the power of this Government, and imposes upon the extradition judge the duty to consider all "evidence or proof as may be deemed competent in the case" (43 Stat. 1698, 1705–1706). The United States is, of course, concerned that its obligations under this treaty be fulfilled.

---

[1] As of January 6, 1959, the United States had entered into extradition treaties with 65 foreign nations and is a party to a multilateral treaty with several nations. (See Note to 18 U.S.C. 3181.) The Department of State has informed the Solicitor General that during the period 1945 through April 18, 1960, it received some 137 requests for the extradition of fugitives from treaty nations.

DISCUSSION

The Congress, in the exercise of its undoubted right to formulate procedures for the execution of extradition treaties (see *Grin* v. *Shine*, 187 U.S. 181, 191–192), has employed judicial machinery for the resolution of the initial question whether evidence establishes probable cause to support the charge by the demanding state of the criminality of the person whose extradition is sought. To this end, by statutory mandate (see, e.g., 18 U.S.C. 3184, 3189, 3190, 3191), Congress has vested authority in a judicial officer[2] to hear the evidence, make findings, and certify his conclusions, along with a copy of all the testimony before him, to the Secretary of State (18 U.S.C. 3184). The functions so delegated are precisely circumscribed by the statute. The extradition judge is not authorized to conduct a trial; he is simply empowered to hear and evaluate evidence and to decide whether there is reasonable basis for holding the accused to answer the charge of the foreign country. The judge is to decide nothing about innocence or guilt, nor does his decision carry with it the incidents of enforcement and sanction. The Secretary of State is not bound to extradite as a result of a judicial certification. And while the judicial determination of sufficiency of the evidence is necessary before the Executive may surrender the accused to the demanding nation, such certification does not have

[2] "* * * any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State * * *" (18 U.S.C. 3184).

the effect of an enforceable command. Essentially, the extradition judge is a fact-finder whose duties are (1) to establish the identity of the person whose surrender is demanded and (2) to determine if there is probable cause that one or more of the crimes specified in the treaty has been committed and, if so, whether there is probable cause to believe that the accused committed it.

It is apparent that, if it had so desired, Congress could have delegated these preliminary functions solely to the Executive, to a grand jury, or to any appropriate forum it chose—in short, Congress could have formulated any rational procedure for the determination of probable cause which it deemed consistent with the proper exercise of our international obligations. *Grin* v. *Shine*, 187 U.S. 181, 191. That Congress entrusted these crucial evidentiary duties to a judicial officer points up, we think, that it contemplated that these duties were to be performed with all the normal attributes of the judicial machinery, including the subpoena power. It is reasonable to assume that, when Congress invested a judicial officer with these critical fact-finding duties, it intended to enable him to use normal judicial powers connected with that function, for it would be strange to require a judicial officer to determine the sufficiency of the evidence to support the charge of criminality but at the same time to deny him recourse to the accepted judicial modes for properly performing that duty.

This view that the extradition judge has the subpoena power finds support in the other judicial functions which normally pertain to such a proceeding.

The judge is to decide upon the relevancy and admissibility of evidence (*Collins* v. *Loisel*, 259 U.S. 309, 317; *Charlton* v. *Kelly*, 229 U.S. 447, 461), and he resolves questions of adjournment and other questions of practice arising at the hearing (*In re Wadge*, 15 Fed. 864, 866 (S.D. N.Y.)). See also *Rice* v. *Ames*, 180 U.S. 371, 377, where this Court rejected the argument that an extradition judge lost jurisdiction by continuing the proceeding in excess of the time permitted to examining magistrates under state law, commenting:

> To hold that the commissioner is confined in the matter of continuances to the methods prescribed for justices of the peace and other magistrates of the particular State would be utterly destructive of his power in cases arising beyond the seas, where weeks might be required to obtain the attendance of witnesses, or the procurement of properly authenticated depositions for use upon the examination.

The function of the extradition judge has been analogized to that of a committing magistrate in an ordinary criminal case. Basically, both must determine whether there is sufficient evidence to hold the accused to answer the criminal charge. See *Benson* v. *McMahon*, 127 U.S. 457, 463; *Charlton* v. *Kelly*, 229 U.S. 447, 461.[4] Examining magistrates in this country have long used the power of compulsory proc-

[4] The treaty with Venezuela provides that "surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there." Article I, 43 Stat. 1699.

ess, considering it so essential to the fulfillment of their responsibilities that its absence would prevent the adequate performance of their duties. Pursuant to the explicit provisions of 18 U.S.C. 3041, a United States judge proceeds in these preliminary examinations according to the Federal Rules of Criminal Procedure, which permit subpoenas to be served anywhere in the United States. The Federal Rules, however, do not normally confer substantive powers; they set out the procedures for the utilization in criminal cases of powers otherwise granted. This is true of the subpoena power which is an inherent attribute of the judicial apparatus, ordinarily available whenever the judge has fact-finding duties. Surely, Congress did not intend that this power be wholly denied to the extradition judge in the conduct of a proceeding of such far-reaching import and significance.

In 18 U.S.C. 3191 (Pet. App. 1, p. 3), Congress assumed the existence of the power of compulsory process in the extradition judge. That section makes provision for the summoning of witnesses on behalf of an indigent accused, and further provides that the costs incident thereto be paid in the same manner as in the case of witnesses subpoenaed in behalf of the United States. Even in the absence of this provision, it would not be in keeping with our concepts of fundamental fairness were an accused in an extradition hearing deprived of the right to secure the attendance of a witness whose testimony is essential. Similarly, to deny a sovereign nation access to the customary subpoena power of our courts in order to secure evidence bearing on the question of probable cause would be to deny the treaty nation a right always granted to the

United States in judicial proceedings and to every accused, including the accused in this proceeding.

As we have said, Congress could have designated or created any appropriate forum it desired to perform these fact-finding functions. When it delegated these functions to the judiciary,[4] it decided to use normal judicial power, including the power of a court to "issue all writs necessary or appropriate" in aid of its respective jurisdiction (28 U.S.C. 1651, Pet. App. 1, p. 3). Cf. *United States* v. *Hayman*, 342 U.S. 205, 221; *Price* v. *Johnston*, 334 U.S. 266, 281. The extradition judge is thus not barred from use of the subpoena power because of the particular restrictions of the Federal Rules of Criminal Procedure (which do not control in extradition), nor is such power confined to the limits provided by the Federal Rules of Civil Procedure for ordinary civil actions. On the contrary, where "necessary and appropriate" to effectuate these Congressionally delegated duties, subpoenas may be issued anywhere in the United States.

The extradition proceeding has no exact counterpart in our system of jurisprudence. It is a legislative creation, the purpose of which is to effectuate treaty relations with foreign nations. The United States believes that it would be inconsistent with the judge's delegated responsibility in this respect, and with the terms of the treaty with Venezuela, to deny him access to any relevant information available in the United States. It would likewise be inconsistent

[4] Article XI of the treaty affirms that "judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested." (42 Stat. 1704.)

with all other forms of judicial procedure to grant the existence of the judge's subpoena power on behalf of an indigent accused (18 U.S.C. 3191), or on behalf of any accused, and to deny the existence of a subpoena power on behalf of a friendly foreign sovereign desiring to bring information before the judge to aid him in the discharge of his statutory responsibility.[1]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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BEATRICE ROSENBERG,
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Attorneys.

MAY 1960.

[1] On March 9, 1960, pursuant to petitioner's motion, District Judge Mathes for the Southern District of Florida, Miami Division, issued an order permitting petitioner to take depositions of officials of the three respondent banks, subpoenas to be issued by the United States District Court for the Southern District of New York, where the banks are situated (Pet. App. 2, pp. 31–33). On March 25, 1960, the Fifth Circuit denied respondents' petition for leave to file a petition for a writ of prohibition or mandamus to vacate that order, holding that Judge Mathes' order was not contrary to the Fifth Circuit's mandate requiring that the Florida subpoenas *duces tecum* be quashed (Pet. App. 3, pp. 15–16). On May 13, 1960, Judge Ryan in the Southern District of New York denied motions to quash the New York subpoenas *duces tecum* but on May 16, 1960, he stayed the taking of the depositions until June 22, 1960. Argument on these issues in the Court of Appeals for the Second Circuit is now scheduled for June 13, 1960. The opinion and order of Judge Ryan are set forth in the Appendix, *infra*.

APPENDIX

In the United States District Court of Southern District of New York

M-8-85

IN THE MATTER OF THE APPLICATION OF THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA TO QUASH THREE SUBPOENAS DUCES TECUM DATED MARCH 15, 1960

M-11-188

IN THE MATTER OF THE APPLICATION OF NAPOLEON DUPOUY TO QUASH TWO SUBPOENAS DUCES TECUM DATED MARCH 15, 1960

M-8-85

IN THE MATTER OF THE APPLICATION OF SILVIO GUTIERREZ TO QUASH A SUBPOENA DUCES TECUM DATED APRIL 18, 1960

RYAN, *District Judge:*

We have before us in this international extradition proceeding several motions, each addressed to the subpoena duces tecum issued by this Court to four separate banking institutions transacting business in this District, commanding them to appear in this Court to give testimony and produce records of accounts maintained with them by the defendant and others. The testimony is sought for use in the United States District Court for the Southern District of Florida, Miami Division, on

a hearing to be held on a complaint pending in that Court and filed pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 (1923), and the applicable extradition statute, 18 U.S.C. § 3184, by respondent, Manuel Aristeguieta, Consul General of Venezuela in Miami, on behalf of his government, the Republic of Venezuela, against Marcos Perez Jimenez, a citizen of Venezuela charged with certain financial crimes (among others) in that country. The questions of law presented are common to all motions; we have considered them simultaneously.

Motions have been made by the banks and by two depositors whose accounts are the subject of the subpoena. The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada, all served within this District, have jointly moved in one motion to quash subpoenae served upon them. Napoleon Dupouy, a depositor of The First National City Bank of New York and of French American Banking Corporation, whose accounts with those banks are a subject of the subpoenae addressed to those banks, has separately moved to quash the subpoenas served upon these banks, in so far as they concern the record of his accounts and transactions with the banks.

Chemical Bank New York Trust Company has not moved with reference to the subpoena served upon it; however, Silvio Gutierrez, a depositor whose account is a subject of the subpoena served upon that bank, has moved to quash the subpoena.

The subpoenae issued pursuant to *Rule 45(d) F.R.C.P.* and our jurisdiction to hear and determine these motions is granted by *Rule 45(b) F.R.C.P.* which gives the "Court * * * upon motion made * * * at or before the time specified * * * for com-

pliance [authority] to quash or modify the subpoenae." Rule 45(d) is specifically made subject to Rule 45(b) when subpoenae duces tecum are involved and there is no limitation in Rule 45(b) as to which Court may grant this relief. (Cf. *Shawmut, Inc.* v. *American Viscose Corp.*, 22 F.R.D. 562; *Underwood* v. *Maloney*, 15 F.R.D. 104.) The District Court in Florida expressly recognized the authority of this Court and in effect directed that motions to quash be made returnable here (Hearing of March 7, 1960, transcript p. 335).

All of the motions challenge the power or authority of this District Court to issue subpoenae duces tecum to compel the attendance of witnesses and the production of records in a hearing on a complaint filed in an international extradition proceeding. We hold this authority to be clear and unquestionable.

The subpoenae were issued and served under an order of the District Court for the Southern District of Florida, Miami Division, entered on March 9, 1960 upon motion of the Consul General granting to him permission to resort to the deposition procedure of Rules 26 and 45 and related provisions of the Federal Rules including procedure for subpoenae duces tecum. These subpoenae directed to the banks were originally made returnable on April 18, 1960; and an additional subpoena served on the Chemical Bank of New York, along with a notice to take its deposition, was made returnable on May 10, 1960.

Before this, The First National City Bank, French American Banking Corporation and The Royal Bank of Canada had been served with subpoenae duces tecum issued by the Clerk of this Court to appear for the taking of their depositions in New York. On November 12, 1959, The First National City Bank moved in the District Court of Florida for a protec-

tive order under *Rule 30(b), F.R.C.P.*, on the ground that the respondent Consul General had not complied with *Rule 15, F.R. Crim. P.* That motion was granted by a Judge of that Court, who by order of November 13, 1959, vacated the subpoenae and notices on the ground that the Federal Criminal Rules should apply to the proceeding. Later, upon petition of respondent, that Court vacated its order and entered a further order that the Court might provide for the taking of testimony by deposition and subpoena, which was premised upon the conclusion that the procedure for the examination of witnesses was not to be restricted by the Federal Rules, and that under the provisions of the Treaty the right to subpoena existed.

Following a hearing before Judge Mathes, the respondent, Consul General, filed a motion pursuant to Section 3184, Title 18, U.S.C., and under the Treaty for an order, in the nature of a subpoena, requiring the banks to appear and to produce in the Florida District Court the documents which had been sought by the prior subpoenae. The Court issued such an order and subpoenae were served by the Marshal of the District Court of Florida upon the banks here in New York.

On December 14, 1959, all the movants here moved to quash the subpoenae; the motion was denied but the subpoenae were modified in respects not here important. An appeal was taken by the banks and these two depositors (among others) from this order denying petitioners' motion, on the grounds that the Court had no power to issue subpoenae in an extradition proceeding and in any case no power to issue subpoenae to be served on persons residing beyond 100 miles from the Court's situs. The United States on this appeal filed a brief amicus curiae urging the

Court's power to issue compulsory process in extradition proceedings. On February 1, 1960, the Court of Appeals for the Fifth Circuit (Chief Judge Rives, dissenting) concluded that the District Court's order should be vacated and the subpoenae quashed.

On March 7, 1960, respondent, Consul General, moved to take depositions of these banks pursuant to subpoenae duces tecum calling anew for the production of the documents as in the prior subpoenae. Judge Mathes held that the order of the Court of Appeals was limited to the question of the power of the District Court to issue subpoenae returnable before it served on persons residing beyond 100 miles, and that under the Treaty and the extradition statute, unwilling witnesses could be compelled to give evidence within the territorial limitations provided by the Civil Rules. Judge Mathes granted the relief sought and specifically reserved to the Court in this District all matters concerning the scope of the subpoenae and depositions and even the question of a stay of the subpoenae. Judge Mathes made it clear that he was granting permission simply to secure and serve the subpoenae requested. The subpoenae have been issued by the Clerk of this Court.

We should also note that the banks and depositor Dupouy petitioned the Court of Appeals of the Fifth Circuit for a writ of prohibition or mandamus to vacate this order urging that Judge Mathes acted in contravention of the prior order of vacatur of the Court of Appeals. On March 25, 1960, the Court of Appeals denied the petition, stating that the propriety of the action of the District Court "was not before this Court nor decided by it and is not contrary to the mandate." Since that time the depositor Gutierrez, after an unsuccessful attempt in the District Court of Florida to quash the notice of deposition

and subpoena duces tecum served on the Chemical Bank, has filed an appeal to the Court of Appeals in the Fifth Circuit.

On the motions now before this Court, the same objections as those urged in the Court of Appeals are again urged.

The final complaint filed herein alleges the commission by the defendant of crimes in Venezuela by a citizen of that country in violation of its penal laws. The complaint meets the statutory requirements of Section 3184, Title 18, United States Code, and charges the defendant with the commission of crimes for which extradition may be requested under the Extradition Treaty with Venezuela. The jurisdiction of the District Court in Florida to proceed under the provisions of Section 3184, Title 18, United States Code, is not questioned on these motions. That Court has a proper complaint before it; the defendant has been found within its territorial jurisdiction and he has been apprehended and brought before it "to the end that the evidence of criminality may be heard and considered." The depositions sought to be taken on the return of the subpoenae now before us and the documents and records sought to be produced, the requesting Government represents, will be "evidence of criminality" it intends to submit in support of extradition and of its pending complaint.

Section 3184 provides that if the Judge before whom the alleged fugitive is brought, after hearing, "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty," he is to certify his finding, with the record, to the Secretary of State; thereupon, on proper requisition, the Secretary of State may surrender the accused to the foreign government.

Article I of the Treaty with Venezuela provides that surrender of the alleged fugitive may be made "only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there." 43 Stat. 1698, 1699. Article XI of the Treaty provides that the evidence submitted at the hearing may include the depositions upon which the warrant of arrest issued and other competent evidence, and that the "judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested." 43 Stat. 1698, 1704.

The functions and duties of the District Judge before whom the complaint is pending and will be heard are somewhat comparable to those of a committing magistrate; he will not, of course, adjudge the guilt or innocence of the alleged fugitive of the crimes charged by the requesting country, but he, after hearing, shall act if "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention." (Section 3184) *Charlton* v. *Kelly,* 229 U.S. 447; *Orteiza y Cortes* v. *Jacobus,* 136 U.S. 330, 334–335.

The District Court here functions in a judicial capacity; he is charged with the making of a judicial determination. In accordance with our fundamental concepts of justice and of due process, he must hold public hearings; the accused must be given due notice of the hearings and be afforded full opportunity to be heard, with limitation only as to the issues presented for determination. Neither the District Judge, nor this Court which acts only in an ancillary capacity, is bound by either the federal criminal or

civil rules when they are found to be in conflict with the terms of the treaty or of Section 3184.

There is no limitation or requirement in the statute or the Treaty that the other competent proof or evidence referred to in Article XI be in possession of respondent, Consul General, at the time of the filing of the complaint, or that it have been obtained by him in the demanding country; and he is free to present other evidence available to him in the asylum state. It is certainly contemplated that the proof submitted on the hearing by a requesting sovereign, in addition to the documents and foreign underlying depositions, may well include the oral and written testimony of witnesses; for, again, there is no limitation.

We see, therefore, no justification for limiting respondent to the testimony of willing witnesses and precluding the obtaining of this same evidence when the witnesses are unwilling, or because of the inability of the hearing magistrate to compel appearance personally before him. Certainly the power to compel such attendance is explicitly assumed in Section 3191 on behalf of an indigent defendant. It can not be argued logically that it ceases to exist when it is the complainant who seeks to invoke it, or an accused with means. It follows that, if the Court has the power to order the testimony of witnesses within its reach, it can order this same testimony when the witnesses are beyond its territorial reach. As the District Judge observed when granting the application to take these depositions, it would not be practical to so limit extradition hearings under Section 3184.

It is the asylum state which dictates the legal formalities to be complied with by the respondent. It does not make for justice to hold that the hands

of the "judicial functionaries" are so tied while the burden of establishing probable cause to the satisfaction of the Judge is cast on respondent and, at the same time, that he is precluded from applying the ordinary procedures made available by the asylum state. Article XI.

Although the District Court gave respondent permission to invoke Rules 26 and 45, F.R.C.P., and related rules of discovery, it is clear from the record before it, from the affidavits submitted in support of the subpoenae and from the subpoenae themselves that respondent's right is limited to the presentation of relevant and material probative evidence in support of its charge of embezzlement and criminal malversation. Neither that Court nor this one holds that, in order to fulfill the statute and the Treaty, we are to accord respondent the limitless right of sweeping discovery afforded our litigants by our civil rules in the hope of discovering evidence to support its complaint, or that the process of this Court may be used in this proceeding solely to investigate whether a crime charged was committed in a foreign country.

The materiality and relevancy of the evidence sought and its probable existence in the hands of the banks in question was demonstrated by the extradition documents, respondent's affidavit and the oral hearing before the District Court to the satisfaction of that Court which described it as evidence "to show that certain funds were taken out of the country, namely, the Republic of Venezuela, and brought to this country and channeled back to the defendant for his use and benefit."

Just as an indigent accused's right to obtain and summon evidence and proof is circumscribed by Section 3191 in that he must show what he "expects to prove", the materiality of the evidence, and his need

of it on the hearing (*Orteiza y Cortes* v. *Jacobus, supra*) so is the respondent's right limited. But it is clear that if a right exists on the part of an accused to explain ambiguities or doubtful elements in the prima facie case made against him and to have witnesses produced for the purpose of explaining matters referred to by the witnesses for the accuser (*Collins* v. *Loisel*, 259 U.S. 309; *United States* v. *Whitem*, Fed. Cases #16, 685, 28 Fed. Cas. 588), a concomitant right must exist on the part of the accuser to have witnesses for the purpose of explaining away ambiguities or doubts on the issue of the commission of the crime and the defendant's implication in it.

It is not for this Court or for movants to question whether in fact respondent has in his possession now more than sufficient proof to meet the requirements of probable cause, or whether he is in fact simply seeking to place on record additional evidence for ultimate use on the trial in Venezuela. He has not rested his case and the Court, which is to finally determine the weight and effectiveness of the respondent's evidence, has given him permission to gather this particular evidence for presentation in the extradition proceeding. That is a matter solely within the discretion of that Court, which in extradition hearings is to be given wide latitude unhampered by formal rules. *Charlton* v. *Kelly, supra.*

A proper interpretation of our obligations under a covenant willingly entered into to assist another friendly nation in furthering the ends of justice, as conceived and adhered to by civilized nations, will fulfill the purpose and underlying philosophy of our Government and people to a greater extent than will

a technical attitude whereby our assistance is grudgingly extended.

We conclude that under Section 3191 of the Statute and Articles I and XI and on the record the District Court had the power to issue the subpoenae before us.

The motions to quash are, therefore, denied.

Extradition proceedings have been repeatedly compared with preliminary commitment proceedings. *Charlton* v. *Kelly, supra; Benson* v. *McMahon,* 127 US 457 (1888); and have many of the indices of a criminal proceeding. *Rice* v. *Ames,* 180 US 371; *Green* v. *Shine,* 187 US 181. We feel that defendant has a right to be present and represented by counsel at any public proceeding held by this Court. (Cf. *Rule 43 of the Rules of Criminal Procedure.*) Defendant has the permission of the Florida District Court to "go to the place, and be in attendance, at the taking of each such deposition" (Order of March 9, 1960).

Since both Rule 30(d) F.R.C.P. and Judge Mathes' order of March 9th empower this Court to limit and control the taking of these depositions and in order to facilitate and expedite these hearings, a Judge of this Court should preside at all hearings.

Therefore, the Consul General shall enter an order incorporating the procedure outlined above scheduling dates acceptable to all parties and arranging hearings before us in a courtroom within this District.

Settle order on notice.

Dated: May 13, 1960.
Filed: May 13, 1960.

/s/ SYLVESTER J. RYAN, *U.S.D.J.*

In the United States District Court of Southern District of New York

M-8-85

IN THE MATTER OF THE APPLICATION OF THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA TO QUASH THREE SUBPOENAS DUCES TECUM DATED MARCH 15, 1960

M-11-188

IN THE MATTER OF THE APPLICATION OF NAPOLEON DUPOUY TO QUASH TWO SUBPOENAS DUCES TECUM DATED MARCH 15, 1960

M-8-85

IN THE MATTER OF THE APPLICATION OF SILVIO GUTIERREZ TO QUASH A SUBPOENA DUCES TECUM DATED APRIL 18, 1960

ORDER DENYING MOTIONS TO QUASH SUBPOENAS

The Application of The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada to quash three subpoenas duces tecum dated March 15, 1960, having come on by motion to be heard before the Court on April 14, 1960; the Application of Napoleon Dupouy to quash the two subpoenas duces tecum dated March 15, 1960, directed to The First National City Bank of New York and French American Banking Corporation, having come on by Order to Show Cause to be heard before this Court on April 14, 1960, together with the Application by the three banks; by order of Chief Judge Ryan dated April 20, 1960, both Applications having been submitted on briefs and further

argument continued to await directions of Chief Judge Ryan; the Application of Silvio Gutierrez, dated April 21, 1960, to quash a subpoena duces tecum dated April 18, 1960, directed to the Chemical Bank New York Trust Company having been assigned to Chief Judge Ryan for consideration with the aforementioned Applications and having been submitted on briefs; the deposition dated fixed in the subpoenas directed to The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada having been April 18, 1960 and by order of Chief Judge Ryan dated April 20, 1960, having been continued to May 10, 1960; the deposition date fixed in the subpoena directed to the Chemical Bank New York Trust Company having been May 10, 1960; on application of Silvio Gutierrez, the deposition of Chemical Bank New York Trust Company having been stayed by the Court, and the other depositions having been postponed by acquiescence of the parties, pending decision by the Court and entry of a final order in the above-entitled applications; and a further hearing herein having been held on May 13, 1960, counsel for all parties making the above-entitled applications having been present, it is

ORDERED that the above-entitled applications are denied for the reasons set forth in the opinion of the Court dated May 13, 1960;

ORDERED that the time for taking the depositions of The First National City Bank of New York, French American Banking Corporation, The Royal Bank of Canada and Chemical Bank New York Trust Company by the officials designated in and pursuant to the aforesaid subpoenas duces tecum is hereby continued to June 22, 1960, on which day said banks shall appear at 10:00 A.M. in Room 129 at the

United States Courthouse, Foley Square, New York, New York, prepared to give testimony and to produce the documents and things set forth in the schedule attached to the respective subpoenas served on them;

ORDERED that a Judge of this Court shall preside over the taking of the aforesaid depositions and all hearings and proceedings in connection therewith;

ORDERED that Marcos Perez Jimenez, the defendant in the extradition proceeding now before the Honorable Judge William C. Mathes sitting by special assignment in the United States District Court for the Southern District of Florida, and his counsel are permitted to attend all of the aforesaid proceedings and depositions; and

ORDERED that the application of counsel for all parties making the above-entitled applications for a stay of proceedings pursuant to the aforesaid subpoenas until an appeal is taken and/or during the pendency of any such appeal is hereby denied.

Dated: May 16, 1960.

/s/ SYLVESTER J. RYAN,
Chief Judge.

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Supreme Court of the United States

OCTOBER TERM, 19[redacted] 63

No. [redacted]

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
Respondents.

BRIEF FOR RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA, IN OPPOSITION TO PETITION FOR CERTIORARI AND SUMMARY REVERSAL OF JUDGMENT

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 892

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
Respondents.

BRIEF FOR RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA, IN OPPOSITION TO PETITION FOR CERTIORARI AND SUMMARY REVERSAL OF JUDGMENT

This brief is submitted on behalf of The First National City Bank of New York (hereinafter referred to as "City Bank"), French American Banking Corporation (hereinafter referred to as "French American"), and The Royal Bank of Canada (herein-

References: "Pet." — Petition of Manuel Aristeguieta.
"R." — Original record in the Supreme Court.
"P. A." — Petitioner's Appendix. There are five appendices to the Petition, each separately paginated.

after referred to as "Royal Bank"), in opposition to petitioner's application for a writ of certiorari to review, and for summary reversal of, the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 29, 1960. That judgment directed that the United States District Court for the Southern District of Florida quash three subpoenas duces tecum which had been issued in Miami and served in New York City upon the respondent Banks.

The subpoenas duces tecum had been issued to obtain, by way of discovery, new and supporting evidence for use in an extradition proceeding against Marcos Perez Jimenez, pending in Miami, Florida, before The Honorable William C. Mathes, United States District Judge. In view of petitioner's application for summary reversal of the judgment of the Court of Appeals, we regret that this brief must necessarily be more comprehensive than is customary in answers to petitions for certiorari.

Questions Presented

1. Does a district judge, sitting as an extradition magistrate, or a United States District Court, purportedly acting in aid of an extradition proceeding, have jurisdiction or power to issue subpoenas duces tecum on behalf of the demanding country in an extradition proceeding where neither the extradition treaty nor any statute enacted by Congress provides for such issuance?

2. May subpoenas duces tecum issued in an extradition proceeding be served upon a witness outside the district in which the extradition proceeding is being conducted, and more than one hundred miles from the place of hearing, when such service is not permitted

by any statute or by the Federal Rules of Civil Procedure, and when the Federal Rules of Criminal Procedure expressly provide that those Rules do not apply to extradition proceedings?

Statement

From the sweeping demands of the subpoenas duces tecum and from the affidavit of Mr. Sidney S. Sachs, one of counsel for Venezuela, it is abundantly clear that petitioner is attempting to conduct the equivalent of a grand jury inquisition in the United States in order to discover, here, new evidence against the defendant, Jimenez, and others. In paragraph 7 of his affidavit, sworn to November 25, 1959, Mr. Sachs alleges (R. 7-8, 76):

> "The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant. It is expected that it will also disclose the method of the illegal concert of action between the defendant and others, as well as the extent and nature of a means for concealment of his illegal conduct adopted by the defendant."

The three Banks moved in the United States District Court for the Southern District of Florida to quash the subpoenas duces tecum served upon them in New York City, but their motion was denied, without opinion (R. 8-11, 15-21; P. A. 2, pp. 22-26). Thereafter, the Banks appealed to the Court of Appeals and made the contentions set forth immediately above (R. 31-33). The Court of Appeals reversed the decision of the District Court, without opinion, and remanded the case with a direction to quash the subpoenas duces tecum (R. 597-600, 601; P. A. 3, pp. 3-7). Petitioner now seeks review and reversal of this judgment of the Court of Appeals for the Fifth Circuit.

The Facts

The salient facts are here summarized:

1. *Commencement of Extradition Proceedings.* On or about August 24, 1959 petitioner (hereinafter sometimes referred to as the "Demanding Country" or as "Venezuela") commenced a proceeding before The Honorable William C. Mathes, a United States District Judge, seeking the extradition to Venezuela of Marcos Perez Jimenez.

2. *First Attempt to Use Subpoenas Duces Tecum.* On or about November 10, 1959 City Bank and French American were served with deposition subpoenas duces tecum requiring their appearance at the United States Court House, Foley Square, New York City, and the production of records of bank accounts of twenty named persons and entities for the period March 14, 1949 to January 23, 1958. These records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence.

3. *Subpoenas Duces Tecum Quashed.* Upon motion of Marcos Perez Jimenez in the extradition proceeding, an order was entered on November 16, 1959 vacating the notice of taking depositions of City Bank and the subpoenas issued pursuant thereto, on the ground that the Federal Rules of Civil Procedure were inapplicable and that the Federal Rules of Criminal Procedure would apply (R. 2-3, 72-73; P. A. 2, pp. 1-2).

On November 23, 1959 an order was entered vacating the order of November 16, 1959 in so far as it directed that the Federal Rules of Criminal Procedure should apply, but it did not affect that part of the prior order which vacated the notice of taking depositions and the subpoenas duces tecum issued pursuant to the Federal Rules of *Civil* Procedure (R. 3-4; P. A. 2, pp. 2-3).

4. *Second Attempt to Use Subpoenas Duces Tecum.* On or about December 2, 1959 City Bank, French American and Royal Bank were each served in New York City with a subpoena duces tecum returnable before the District Court in Miami, Florida, and requiring the production of records of bank accounts of twenty-one named persons and entities for the period March 14, 1949 to November 25, 1959 (P. A. 2, pp. 3-16). These records are the same records which were sought under the subpoenas referred to in paragraph 2 above, issued on or about November 10, 1959.

Thereafter the Banks moved to quash these subpoenas in the District Court in Miami, and on December 15, 1959 an order was entered denying the motion to quash (R. 8-11, 15-21; P. A. 2, pp. 22-26). On December 29, 1959 the Banks appealed from this order to the United States Court of Appeals for the Fifth Circuit (R. 31-33).

5. *Subpoenas Duces Tecum Quashed.* On January 29, 1960 the Court of Appeals unanimously held that the order of December 15, 1959 was final and appealable, and a majority of the Court held that the order should be vacated and the subpoenas duces tecum quashed. *Aristequieta* v. *Jimenez,* 274 F. 2d 206 (5th Cir. 1960).

6. *Pending Attempt to Use Subpoenas Duces Tecum.* Since that decision of the Court of Appeals of which petitioner now seeks review and reversal, petitioner has again attempted to compel production of the records which he sought by the subpoenas which the Court of Appeals quashed. On petitioner's motion, Judge Mathes on March 9, 1960 entered an order in the extradition proceeding granting to Venezuela permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of

Civil Procedure, including the issuance of subpoenas duces tecum, to secure evidence from officials of the Banks in New York City (P. A. 2, pp. 31-33).

On or about March 15, 1960, each Bank was served with a deposition subpoena duces tecum requiring its appearance on April 18, 1960 at the United States Court House, Foley Square, New York City, and the production of records of bank accounts of twenty-two named persons and entities for the period March 14, 1949 to June 30, 1958. These records are the same voluminous records sought by each of the earlier subpoenas, referred to in paragraphs 2 and 4 above.

7. *Petition for Writ of Prohibition or Mandamus.* On March 16, 1960 the Banks applied to the Court of Appeals for the Fifth Circuit for permission to file a petition for a writ of prohibition or mandamus, directing Judge Mathes to vacate his order of March 9, 1960, on the ground that this order was contrary to the earlier decision and mandate of the Court of Appeals referred to in paragraph 5 above. But the Court of Appeals denied the application, stating:

> "The propriety of the action of the district court referred to in the proposed petition for writ of prohibition or mandamus was not before this Court nor decided by it and is not contrary to the mandate in No. 18176, decided January 29, 1960." (P. A. 3, pp. 15-16)

Thus, the Court held only that to grant to Venezuela permission to take depositions pursuant to subpoenas duces tecum was not a violation of its earlier mandate, since that mandate did not deal with notices of depositions and subpoenas duces tecum *issued in New York*, pursuant thereto. For the mandate had directed only that the subpoenas

duces tecum *issued in Florida and served in New York* on December 2, 1959 be quashed. Since the District Court had quashed those subpoenas, the Banks' application for mandamus was denied.

8. *Pending Proceedings in the Second Circuit.* The Banks then moved in the United States District Court for the Southern District of New York to quash the subpoenas duces tecum presently outstanding, but on May 13, 1960 Judge Ryan denied their motion. The Banks have now appealed to the United States Court of Appeals for the Second Circuit from that decision.

Summary of Argument

A. The petition for a writ of certiorari should be denied.

There are no "special and important" reasons for granting certiorari in this case. Neither petitioner nor the United States, as *amicus curiae,* has been able to point to a single instance in the history of this nation in which a subpoena of any type has been issued in aid of the demanding country in an extradition proceeding. Apparently Venezuela is the only demanding country which has ever sought to use the discovery procedures of the United States to gather evidence of guilt here for use in an extradition proceeding. Certainly the alleged needs of one petitioner do not make an issue one of grave and public importance.

Moreover, petitioner's request for a writ of certiorari ignores an important requirement long established by this Court for granting such writs: the requirement that the decision to be reviewed must not only be final but complete. Since the decision of the

Court of Appeals, Fifth Circuit, petitioner has applied for and received from Judge Mathes, the extradition judge, permission to take the testimony of the three Banks in New York, pursuant to deposition subpoenas duces tecum. Such subpoenas were served on the Banks on March 15, 1960 and are still outstanding (pp. 5-6, *supra*). Thus, petitioner has sought another opportunity to raise the question of the power of an extradition judge, or a District Court purportedly acting in aid of extradition, to issue subpoenas duces tecum on behalf of the demanding country.

B. The request for summary reversal should be denied.

Extradition is a non-judicial proceeding specifically regulated by statute and treaty, conducted before a magistrate of the United States (in this instance a district judge), and is not a proceeding within the jurisdiction of a United States District Court or of any court. The statute governing the extradition proceeding itself, 18 U. S. C. § 3184, confers jurisdiction only on "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any state."

The hearing before the extradition judge is not a "case" or "controversy": there is no decision respecting the rights and duties of the parties to a controversy; no opportunity for the fugitive to raise matters in defense or to have his guilt or innocence determined; and no contentions of present or possible adverse parties submitted for adjudication. In addition, the extradition proceeding does not result in a final de-

cision, but is advisory only. The extradition magistrate merely certifies the evidence and his findings, if he concludes that extradition is warranted by such evidence, to the Secretary of State, who is not bound to extradite the fugitive.

Although the extradition magistrate exercises certain of the incidents common to judicial proceedings, such as the issuance of a warrant of arrest and the determination of "probable cause," there is no basis for concluding that the proceeding itself is a judicial proceeding. The proceeding is before an extradition magistrate who exercises only limited and quasi-judicial powers.

Neither the statutes governing extradition, 18 U. S. C. §§ 3181-95, nor the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 (1923), authorizes the extradition magistrate to issue subpoenas duces tecum.

The subpoenas duces tecum which were quashed by the Court of Appeals for the Fifth Circuit were returnable before the United States District Court in Miami. But a United States District Court has no jurisdiction or power to act in aid of an extradition proceeding. The federal courts are courts of limited jurisdiction and can take cognizance only of those matters which Congress has entrusted to them by statute. No general power to issue subpoenas duces tecum inheres in United States District Courts; specific congressional authorization is necessary. No such congressional authorization exists.

A fortiori an extradition judge or commissioner has no inherent power to issue subpoenas duces tecum.

And, as we have pointed out, no statute or treaty grants this power.

The Federal Rules of Civil Procedure apply only to *suits* of a civil nature in district *courts*, and hence are not applicable to extradition. Moreover, a United States District Court cannot use the procedures provided in the Civil Rules in aid of a proceeding which is not before it or before another District Court.

The Federal Rules of Criminal Procedure "are not applicable to extradition." Rule 54(b)(5).

The "all writs" statute (28 U. S. C. § 1651) applies only to "courts established by Act of Congress," and therefore confers no power on the extradition magistrate. Moreover, a federal court can issue writs only in cases which are within its jurisdiction, and a United States District Court has no jurisdiction over an extradition proceeding. Finally, the "all writs" statute does not, in any event, increase or expand the jurisdiction of the courts.

The basic principle and purpose of extradition precludes the use, in the United States, of subpoenas or of discovery in any form to support the request of the demanding country. For extradition presupposes that the demanding country will come to the asylum country with *prima facie* proof of criminality.

Even if the power exists for the issuance of subpoenas on behalf of the demanding country, there is no authority permitting their service beyond the usual territorial limits of process. These limits find expression in Rule 45 (e)(1) of the Federal Rules of Civil Procedure, which provides for service of subpoenas

only within the district or not more than 100 miles from the place of hearing.

Jurisdiction of federal courts is territorial, and a specific exception by Congress is necessary to extend it. No such exception exists in extradition. The "all writs" statute, on which petitioner relies, does not expand or extend the territorial jurisdiction even of the courts to which it applies.

POINT I

International extradition is a non-judicial proceeding, specifically regulated by statute and treaty, conducted before a magistrate of the United States—in the present case, a judge of a United States District Court—and is not a proceeding within the jurisdiction of a United States District Court or of any court.

International extradition proceedings are *sui generis,* non-judicial in nature, and are not conducted in a United States District Court, in a "legislative court" or in any other court. The Jimenez extradition proceeding was commenced under a Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 (1923), and the federal extradition statutes, 18 U. S. C. §§ 3181 et seq., the pertinent provisions of both of which are set forth in Appendices A and B hereto.

The right of a foreign power to demand the extradition of one accused of crime and the correlative duty to surrender the accused exists only when created by treaty. In the United States, in the absence of statutory or treaty provisions, no authority exists to surrender a fugitive criminal to a foreign government. The right of extradition rests upon the principle of

comity, based upon the view that it is in the interests of all civilized communities that crimes should not go unpunished. But power to extradite an accused national of the demanding country must be found in the statute or treaty governing extradition. These principles are so thoroughly established as to require no detailed citation of authority.

I

The Applicable Federal Statutes

1. General International Extradition Procedure—Title 18 U. S. C. § 3184

Under the provisions of Section 3184, jurisdiction over preliminary proceedings for extradition to a foreign country is, in the United States, vested solely in judges or justices of federal courts, commissioners expressly authorized by federal courts, and *judges of state courts of record of general jurisdiction.* Of utmost significance is the fact that the proceedings are not before a United States District Court or indeed before any court, but are before a justice, judge or commissioner sitting as a magistrate of the United States.*

Section 3184 provides that whenever, as here, there is a treaty of extradition between the United States and

* Annexed as an appendix to the memorandum for the United States as *amicus curiae* is the opinion of Judge Ryan denying the Banks' motion to quash (p. 7, supra).

Judge Ryan states (p. 9): that the extradition proceeding is pending in "the United States District Court for the Southern District of Florida, Miami Division". This is a fundamental error which pervades the entire opinion. Clearly, the extradition proceeding is not before a United States District Court but before a district judge only.

any foreign government, such magistrate may issue his warrant for the apprehension of any person found within his jurisdiction who has been charged upon a complaint made under oath with having committed, within the jurisdiction of the foreign government, any of the crimes provided for in the treaty.

A person so charged may then be brought before the magistrate "to the end that the evidence of criminality may be heard and considered." If, on such hearing, the magistrate "deems the evidence sufficient to sustain the charge . . . , he shall certify the same, together with a copy of all the testimony taken before him," to the Secretary of State of the United States. This is done in order that a warrant may issue upon the requisition of the proper authorities of the foreign government, for the surrender of the person charged. And, the magistrate shall then issue his warrant for the commitment to jail of the person charged until his surrender shall be made.

As will be shown hereinafter, Article XI of the treaty between the United States and Venezuela provides that application for the surrender of fugitives shall be made by the diplomatic agents of the demanding government or, in certain instances, by its superior consular officers. And the *judicial functionaries* of the demanding country must prescribe the method of complying with the legal formalities of the country of asylum, that is, the country of which the extradition is requested—in the present case, the United States.

Clearly the federal statute, Section 3184, confers authority to arrest and hear evidence of criminality only upon a federal judge or justice, upon a commissioner properly empowered or upon *any judge* of a

court of record of general jurisdiction *of any state*. No grant of jurisdiction is made to a United States District Court or to any other court. That Congress chose to place the responsibility for extradition hearings upon judges or others trained in the law was obviously sound, for such individuals are familiar with the concept of "probable cause" and are skilled in the evaluation of evidence.

A state or federal judge is, when hearing an extradition proceeding, a magistrate of the United States, and the proceeding is not a suit, prosecution or proceeding in the court of which he is a judge. Thus in *In re Keene's Extradition*, 6 F. Supp. 308 (S. D. Texas 1934), a fugitive made application to the United States District Court for the removal to the District Court of an extradition proceeding pending before a state court judge. The District Court held, however, that the extradition proceeding could not be removed since it was neither a civil suit nor a criminal prosecution commenced in a state court. The Court said (p. 309):

> "... The proceeding before Judge Mullally was neither under nor by virtue of a state law, nor was it in, nor commenced in, the state court of which he is judge. *It was before him under the treaties and laws of the United States, and as a magistrate of the United States.*
>
> "Section 651 [predecessor of Section 3184] gives any justice of the Supreme Court of the United States the same jurisdiction in extradition matters as is given a state court judge, yet it would hardly be contended that there would be commenced a suit in the United States Supreme Court should a justice thereof see fit to proceed under

such section and/or such treaty." (Emphasis added)

2. Hearing and Evidence before the Extradition Magistrate—Title 18 U. S. C. § 3190

Under the provisions of Title 18 U. S. C. § 3184 a person arrested on an extradition warrant is entitled to a hearing within the state or district in which he is found. But the hearing before the extradition magistrate is of limited scope, and is of the nature of a preliminary hearing or examination relating only to possible commitment for future trial. The magistrate is required by the statute, if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, to certify such evidence, together with a copy of the testimony taken before him, to the Secretary of State.

The depositions, warrants or other papers or copies thereof offered in evidence under Section 3190 *by the demanding country* are to be received and admitted as evidence for all purposes of the hearing. This is subject to the condition, however, that such papers shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals *of the demanding country*. To enforce observance of this condition, the certificate of the principal diplomatic or consular *officer of the United States resident in the demanding country* shall be proof that the documents offered are authenticated in the manner required.

To justify a magistrate in committing a prisoner for extradition to a foreign country, it is not necessary that the evidence be sufficient to convict. All that is required is that the evidence be such as would be deemed suffi-

cient to justify holding the prisoner for trial if the offense had been committed where the accused is found. The requirement is satisfied by evidence affording reasonable ground to believe that the accused is guilty of the offense with which he is charged and that it is an offense within the treaty.

Under Section 3190 it is clear that the depositions and other documents which a demanding country may produce in support of the charge made are only those which it has obtained *in the demanding country.* To find that the section authorizes the taking of depositions in the United States, pursuant to the Federal Rules of Civil Procedure or otherwise, would require a tortured interpretation, taking the word "depositions" and "other papers or copies thereof" wholly outside the context and import of the section. We have not found, nor have our adversaries cited, a single case where depositions produced by the demanding country were obtained by discovery proceedings through the use of United States courts or other judicial procedures.

In *Charlton* v. *Kelly,* 229 U. S. 447, 459-60 (1913), the Supreme Court described the procedure upon an extradition proceeding as follows, quoting *Benson* v. *McMahon,* 127 U. S. 457, 462-63 (1888):

> " 'Taking this provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day in this country before an examining or committing magis-

trate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that "the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." This describes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

" 'We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress, and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government.' "

That Section 3190 obviously relates only to evidence offered by the demanding country and gives no right to the accused to introduce such evidence is clear from

In re Luis Oteiza y Cortes, 136 U. S. 330, 336-37 (1890). In that case the Supreme Court stated that the predecessor to Section 3190:

> ". . . applies only to papers or copies thereof, which are offered in evidence by the prosecution to establish the criminality of the person apprehended; and that it does not apply to documents or depositions offered on the part of the accused . . . ."

Moreover, the *Oteiza* case strongly suggests that the fugitive may not introduce any documentary evidence from any source but is restricted to the presentation of oral testimony, extremely limited in scope. He may not introduce any matters in defense of the charges made against him, nor may he cross examine the witnesses for the demanding country, nor may he rebut the evidence offered by the demanding country. *Charlton* v. *Kelly, supra.*

Thus, the fugitive cannot introduce, among other things, evidence showing: that he is insane, *Charlton* v. *Kelly, supra;* that he has an alibi, *Desmond* v. *Eggers,* 18 F. 2d 503 (9th Cir. 1927); or that the statute of limitations has run before extradition is sought, *Hatfield* v. *Guay,* 87 F. 2d 358 (1st Cir. 1937), *cert. denied,* 300 U. S. 678 (1937). For, those are defenses which may properly be raised only on his trial after extradition to the demanding country. The extradition proceeding itself is, in no sense, a trial.

3. Witnesses for Indigent Fugitives—Title 18 U. S. C. § 3191

This section provides in brief: that the extradition judge or commissioner may subpoena witnesses at the expense of the United States, on behalf of an indigent fugitive, on his showing by affidavit that certain condi-

tions specified in the section exist. Among those conditions are statements that there are witnesses "whose evidence is material to his defense," and that "he cannot safely go to trial without them."

At first blush this section might seem to suggest that an indigent fugitive would have liberal rights to adduce testimony in his own defense. Actually, his rights are extremely limited. For the Supreme Court has held in *Charlton* v. *Kelly, supra,* that the word "trial" in the section does not alter the type of proceeding stipulated by statute and treaty, and does not give to the accused any greater right to introduce evidence than he otherwise has. The Court said (p. 458):

> *"The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty.* To this we cannot agree. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. *True, the statute speaks of evidence 'material for his defense, without which he cannot safely go to trial,' but we cannot discover that Congress intended to depart from the provisions of Article I* of the treaty which requires that a surrender shall be made 'upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed.'" (Emphasis added)

Particularly, it should be noted that Section 3191 is limited in application to a subpoena issued on behalf

of an *indigent fugitive* and that no other subpoena power is granted to the judge or commissioner sitting as a committing magistrate. When Congress has thus expressly limited the application of Section 3191 to subpoenas on behalf of indigent fugitives, there is no warrant for any court to ignore that limitation and to authorize subpoenas duces tecum on behalf of the demanding country. Manifestly, the doctrine of *expressio unius, exclusio alterius* should apply. For, if there were any intent under the governing statutes to give a broad power of subpoena and discovery to the *demanding country*, Congress would have said so, expressly. This it has not done.

It is obviously one thing to speculate about the possible extension of this section by implication to cover all fugitives—rich as well as poor; but it is quite another to assert that it confers upon the *demanding country* unlimited power of discovery by subpoenas duces tecum and otherwise. The demanding country already has a great preponderance of advantage.

Furthermore, it seems clear that Section 3191 is limited to subpoenas calling only for the appearance and oral testimony of witnesses for the indigent fugitive, and does not extend to the compulsory production and surrender of documents pursuant to subpoenas duces tecum. This is the thrust of the Supreme Court's views as stated in the *Oteiza* case, *supra*. Moreover, under the doctrine of *Ex Parte Moses*, 53 Fed. 346 (E. D. Pa. 1892), and *In re Outcault*, 149 Fed. 228 (S. D. N. Y. 1906), unless the authority to issue subpoenas duces tecum is specifically granted, the only subpoena that may be issued is one calling for the appearance of witnesses and oral testimony.

II

The Extradition Treaty Between the United States and Venezuela

Article I—Reciprocal Delivery of Persons Charged with Crime

Under this Article the United States and Venezuela agree to deliver up to justice any person who may be charged with any of the crimes specified in *Article II*. *Article I* expressly provides:

> "... Such surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there."

Article XI—The Duties of the Demanding Country

This Article so far as pertinent provides with respect to requisitions: that applications for the surrender of fugitives shall be made by the diplomatic agents of the United States or of Venezuela, or in certain instances by superior consular officers. With reference to the procedure to be followed by the demanding country in order to secure a "preliminary arrest" the Article provides:

> "It shall be competent for such diplomatic or superior Consular officers to ask and obtain the *preliminary arrest* of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested." (Emphasis added)

This provision obviously deals only with the "preliminary arrest" of the fugitive and not with the subsequent hearing before the extradition judge or magistrate. It is the duty of the judicial functionaries or officers of the demanding country (Venezuela) to prescribe such methods for accomplishing the preliminary arrest of the fugitive as are necessary to comply with legal formalities in the United States.

But Venezuela contends that the term "judicial functionaries" refers to the extradition magistrate in the country of asylum (Pet. 19, 34). Not so! *Article XI* provides only that the "*funcionarios judiciales*" of the demanding country shall prescribe the method of complying with the legal formalities of the asylum country in order "to ask and obtain the *preliminary arrest* of the person whose surrender is requested." Nothing in *Article XI* requires the demanding country to "prescribe the method" to be used at the hearing before the "*juez o magistrado,*" as the committing magistrate is called in the Spanish counterpart of *Article XII,* which deals only with the duties of the extradition judge or magistrate.

Moreover, there is nothing unusual about the fact that in certain respects Venezuela must devise methods of complying with United States law. The treaty itself imposes such duties upon the demanding country. Thus *Article I* requires the demanding country to produce evidence with respect to the fugitive which would "justify his detention and commitment for trial if the crime or offense had been committed" in the United States. In addition, the demanding country must see to it that its documentary evidence has been authenticated as required by the United States statute, 18 U. S. C. § 3190.

It would be incredible, however, if the magistrate were, in fact, empowered to invent his own rules as he goes along, as the petitioner here suggests. How can Venezuela consistently urge, on the one hand, that extradition is a judicial proceeding subject to established judicial procedures, and, on the other, insist that the procedures are left to the personal improvisation of the extradition judge? (Pet. 17-18, 20-24, 34, 39)

Article XI then further provides, with respect to the proof which the demanding country must submit in support of its request, that where the fugitive is merely charged with a crime rather than having been convicted in the demanding country:

> "... a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case."

The final phrase of the quoted sentence, "with such other evidence or proof as may be deemed competent in the case," clearly refers to proof in addition to the warrant of arrest and supporting depositions—all of which must, under 18 U. S. C. § 3190, originate in and be authenticated according to the laws of the demanding country.

Venezuela asserts that the quoted language is authority for the discovery and collection of documentary evidence in the United States, but no such conclusion is warranted (Pet. 31-33). The only statutory provision relating to documentary evidence produced by the demanding country is 18 U. S. C. § 3190, which requires that documentary evidence be authen-

ticated so as to entitle such evidence to be received for similar purposes *by the tribunals of the demanding country,* and provides that a certificate of the United States diplomatic or consular officer *resident in the demanding country* shall be proof of proper authentication. Thus, documents not properly authenticated under this section are clearly incompetent in the extradition proceeding.

The inescapable conclusion is that *all* documentary evidence submitted by the demanding country at the extradition hearing, with one specific and limited exception, must be discovered and assembled in the *demanding country,* otherwise such evidence could not be authenticated pursuant to the provisions of Section 3190, and would not be competent at the hearing.

The only reference, either in the treaty or in the governing statutes, to the use of evidence discovered in the United States, the country of asylum, appears in *Article X* of the Treaty. This relates to the one specific and limited exception just referred to. *Article X* provides, among other things:

> *"Everything found in the possession of the fugitive criminal at the time of his arrest,* whether being the proceeds of the crime or offense, or *which may be material as evidence in making proof of the crime,* shall, so far as practicable . . . be delivered up with his person at the time of the surrender. Nevertheless, the rights of a third party with respect to the articles aforesaid shall be duly respected." (Emphasis added)

Had the United States and Venezuela intended to make *general* provision for the discovery and assembly of evidence in the United States as proof of crimes charged in the demanding country, they would reason-

ably have been expected so to provide in *Article X*. But they did not do so there, or anywhere else. On the contrary, they made only this one specific and narrow exception. The rule of *expressio unius* applies.

Article XII—Duties of the Extradition Judge or Magistrate

Article XII, it should be noted, expressly refers three times to the officer presiding at the hearing as a "judge or a magistrate." The presiding extradition officer is nowhere referred to as a "judicial functionary" as are the officers of the demanding country who, under *Article XI*, must prescribe the method of compliance with the legal formalities of the country of asylum in order to secure the "preliminary arrest" of the accused. Neither in this Article nor elsewhere in the treaty is there any reference made to a court.

POINT II

International extradition is not a judicial proceeding in a United States District Court, involving a case or controversy, permitting and requiring the exercise of full judicial power.

A judicial proceeding is one in which parties litigate their respective rights and duties in some case or controversy before a court of justice. Each party has the same opportunity to present all matters favorable to its cause and the processes of the court are equally available to all. After hearing all of the legally admissible evidence presented by each party, the court renders a judgment which is binding on the parties and which is final, subject only to possible appeal to a higher judicial tribunal. In sum, there must be a case or controversy susceptible of adjudication, submitted to a

judicial tribunal which has the power to render a final and binding determination.

As was said in *Laubenheimer* v. *Factor*, 61 F. 2d 626, 628 (7th Cir. 1932), *aff'd*, 290 U. S. 276 (1933):

> "Under our law, extradition is not a judicial function; it is reposed in the Department of State."

1. An Extradition Proceeding is Not a "Case" or "Controversy"

The terms "case" and "controversy" were defined by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. 241, 255 (N. D. Cal. 1887), as follows:

> ". . . By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

This definition was quoted with approval by the United States Supreme Court in *Muskrat* v. *United States*, 219 U. S. 346, 356 (1911), in which the Court held that:

> ". . . by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred."

Applying these tests, it is apparent that international extradition is not a judicial proceeding. A "decision" in an extradition proceeding is advisory, and merely informs the Executive Department that there is sufficient evidence to sustain a charge. It is not the determination of a case or controversy. There is in an extradition proceeding no decision respecting the rights and duties of parties to a controversy; no opportunity for the fugitive to raise matters in defense or to have his guilt or innocence determined; and no contentions of present or possible adverse parties "submitted to the court for adjudication."

2. An Extradition Proceeding Does Not Result in a Final Decision*

One of the essential attributes of all judicial proceedings is that a final and binding determination of the rights and duties of the parties involved must be reached at some point within the judicial hierarchy. In so holding, the Supreme Court, in *Gordon* v. *United States*, 117 U. S. 697, 702 (1864), stated:

> "The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it."

The conclusion that an extradition proceeding lacks the finality necessary to a judicial determination is supported by an opinion of the Attorney General of the United States, rendered in 1843, dealing with a proceeding under the Extradition Treaty of 1842 with Great Britain (4 Op. Att. Gen. 201, 210-11):

> *"This is not a case in law or equity within the scope and meaning of the first clause of the second*

* The memorandum for the United States as *amicus curiae* (pp. 3-4), in effect, concedes this.

section of the third article of the constitution of the United States. The provisions of that section are applicable only to cases which assume a legal form for forensic litigation and judicial decision, in which a final judgment may be rendered, and by whose decision the parties will be bound. *It does not contemplate a question of the description under consideration, in reference to which a preliminary proceeding is authorized as ancillary to a power in its nature political, created not by the constitution, but emanating from the concurrent wills of two independent governments.* Had the treaty conferred upon the magistrate—if it could have been made competent to such an object—the power of trying the person charged for an offense committed within a foreign jurisdiction, and of punishing in case of ascertained guilt, the inquiry might have presented itself in a different aspect. But the stipulations under examination aim at no such end, but are confined to the ascertainment of facts which can weigh nothing in any consequent and purely judicial investigation of the charge.

"It would seem to be clear, too, if the case be one of judicial cognizance under and by force of the constitution, that the jurisdiction once attaching would adhere to the subject till it had been definitely disposed of—a proposition which can in no sense be predicated of an offense committed within the dominions of a foreign power." (Emphasis added)

3. An Extradition Proceeding is Not a Judicial Proceeding Merely Because the Magistrate Exercises Certain of the Incidents of Judicial Power

While it is true that the extradition magistrate exercises certain incidents of judicial power, such as the right to issue a warrant of arrest and to determine "probable cause," there is no basis for assuming that

the proceeding itself is a judicial proceeding. The Supreme Court considered this problem in *United States* v. *Ferreira*, 13 How. (54 U. S.) 40 (1851), with respect to a proceeding similar to extradition.

That case dealt with an act of Congress implementing the treaty of 1819 with Spain which ceded Florida to the United States. 3 Stat. 768 (1823). The act provided that judges of certain courts in Florida should receive and adjudge certain claims and further provided:

> ". . . That, in all cases in which said judges shall decide in favour of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favour the same is adjudged, out of any money in the treasury, not otherwise appropriated."

The district judge allowed Ferreira's claim, and the United States sought to appeal from this allowance. The Court decided that the proceedings were non-judicial in nature and stated (pp. 47-48):

> "*It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of congress did not intend to make it one.* The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the *territorial limits* to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. . . .
>
> * * * * *

> *"The powers conferred by these acts of congress upon the judge as well as the secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them.* But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as on a commissioner. *But it is not judicial in either case, in the sense in which judicial power is granted by the constitution to the courts of the United States."* (Emphasis added)

A comparison of the claim proceedings in the *Ferreira* case, *supra,* with an extradition proceeding makes it apparent that the views there expressed by the Supreme Court are equally applicable to an extradition proceeding. For in both proceedings: the "decision" of the judge is not final, but must be certified, together with all evidence, to the Secretary of an Executive Department of the Government; no appeal lies to the courts from the "decision" of the judge; and the authority to conduct the proceedings was conferred by Congress upon judges, and not upon courts.

POINT III

Neither an extradition magistrate, nor a United States District Court purportedly acting in aid of extradition, has power to authorize or issue subpoenas duces tecum, or to authorize the use of discovery proceedings, on behalf of the demanding country.

I

1. It is indisputable that federal district courts are courts of limited jurisdiction and possess only such

jurisdiction as Congress has, by statute, conferred upon them. In *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (10th Cir. 1957), *cert. denied*, 356 U. S. 960 (1958), *rehearing denied*, 357 U. S. 924 (1958), this proposition was stated as follows (p. 917):

> "The federal courts are courts of limited jurisdiction and can take cognizance of only those matters which Congress has entrusted to them by statute."

The limitations on the jurisdiction of federal district courts are stated in *Moore's Federal Practice* (Second ed. 1959, vol. 1, pp. 607-8):

> ". . . Federal courts . . . have a jurisdiction that is limited in two respects. First, federal judicial power embraces only the matters enumerated in the Constitution. Second, aside from the Supreme Court, federal courts have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them. In brief, the jurisdiction of the district courts, then, is limited to that which Congress has granted them by a valid statute."

No general power to issue subpoenas duces tecum inheres in United States District Courts. As with all other exercises of judicial power by a District Court, the power to issue subpoenas is limited to those situations in which Congress has conferred such power on the Court. *Janssen* v. *Belding-Corticelli, Ltd.*, 84 F. 2d 577 (3rd Cir. 1936).

A fortiori an extradition judge or commissioner has no inherent power to issue subpoenas. This principle was succinctly stated in *In re Pacific Tele-*

phone & Telegraph Co., 38 F. 2d 833, 836, 837 (N. D. Cal. 1930):

> "It is further argued that the fact that a United States commissioner, in passing upon the question of probable cause sufficient to support the application for a search warrant, is acting judicially is a sufficient basis for implying power to subpoena witnesses in aid of the judicial function. *The mere exercise of judicial power does not invest a functionary with the aids to jurisdiction peculiar to courts of record.* . . . In other words, the powers of the United States commissioners are quasi judicial only, and, unless the plain language of a statute confers authority, the nature of his function is an insufficient basis for enlarging his jurisdiction. . . ."
>
> * * * * *
>
> ". . . The Espionage Act . . . confers concurrent power to issue search warrants upon a judge of a United States District Court, or a judge of a state or territorial court of record, or an United States commissioner. While the act of issuing a search warrant presupposes a 'judicial' hearing, such hearing is quasi judicial only, and the official issuing the warrant is acting as a magistrate rather than as a judge of this court. . . . There must be some proceeding pending over which the court has or may assume jurisdiction."

2. Patently the Federal Rules of *Civil* Procedure apply neither to an extradition proceeding nor to a purported proceeding in a United States District Court in aid of extradition. The discovery procedures outlined in the Civil Rules are designed to be used in the course of a *civil action* pending in a federal court and cannot be utilized independently of such action. Thus

Rule 1, which sets forth the application of the Civil Rules, states:

> *"Rule 1. Scope of Rules*
>
> These rules govern the procedure in the United States district *courts* in all *suits* of a civil nature whether cognizable as *cases* at law or in equity...." (Emphasis added)

A District Court has no power, therefore, to use such procedures in aid of a proceeding which is not pending before it or before another District Court.

> *Beard* v. *New York Central RR.*, 20 F. R. D. 607 (N. D. Ohio 1957);
>
> *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F. R. D. 359 (S. D. N. Y. 1957);
>
> *Amand* v. *Pennsylvania RR.*, 17 F. R. D. 290 (D. N. J. 1955);
>
> *Bachrach* v. *General Investment Corp.*, 31 F. Supp. 84 (S. D. N. Y. 1940).

3. The Federal Rules of *Criminal* Procedure apply neither to an extradition proceeding nor to a purported proceeding in a United States District Court in aid of extradition. For Rule 54(b)(5) provides: "These rules are not applicable to extradition and rendition of fugitives . . . ."

4. Petitioner asserts that the "all writs" statute (28 U. S. C. § 1651) grants power to the extradition judge to issue subpoenas in aid of an extradition proceeding (Pet. 14, 18, 24-27). But Section 1651 provides:

> "The Supreme Court and all *courts* established by Act of Congress may issue all writs necessary

> or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." (Emphasis added)

Clearly the language of the section, itself, contains the answer to petitioner's assertion. For the writs referred to can only be used in aid of the jurisdiction of the *court* issuing the writ, not, as petitioner contends, in aid of the jurisdiction of the district judge over an extradition proceeding. Moreover, a federal court can issue writs only in cases which are within its jurisdiction, and a United States District Court has no jurisdiction whatsoever over an extradition proceeding.

Finally, the "all writs" statute does not increase or expand the jurisdiction of the courts. *United States* v. *First Federal Savings and Loan Ass'n,* 248 F. 2d 804 (7th Cir. 1957). Thus the "all writs" statute is inapplicable.

The cases cited in support of petitioner's contention (Pet. 14, 18, 25) obviously have no application. *American Lithographic Co.* v. *Werckmeister,* 221 U. S. 603 (1911), involved an action for copyright infringement, and the Supreme Court held that the predecessor to Section 1651, the "all writs" statute, gave the trial court authority to issue subpoenas duces tecum to compel the production of documents for use in the civil action before it. However, there is no suggestion in the opinion that such subpoenas could be issued in aid of a proceeding other than the one pending in the court below. In addition, the trial court patently had jurisdiction over the suit itself, and therefore the "all writs" statute was properly invoked to supply ancillary procedures.

The other two cases relied upon by petitioner, *Kamen Soap Products Co.* v. *United States,* 110 F. Supp. 430 (Ct. Cl. 1953), and *Bethlehem Shipbuilding Corp.* v. *NLRB,* 120 F. 2d 126 (1st Cir. 1941), have no bearing for the same reasons as those discussed with respect to the *Werckmeister* case. For both cases involved the use of subpoenas by a court in a proceeding pending before that court, and in each case the court clearly had jurisdiction over the judicial proceeding before it.

Petitioner further contends (Pet. 18-19) that a United States District Court may exercise judicial power to assist the conduct of proceedings before a district judge, citing *The United States, Petitioner,* 194 U. S. 194 (1904), and *United States* v. *Tom Wah,* 160 Fed. 207 (N. D. N. Y. 1908), *aff'd,* 163 Fed. 1008 (2d Cir. 1908). This is erroneous. A United States District Court, as we have shown, can exercise no powers unless authorized to do so by Congress. But petitioner cites no such authorization in support of its contention and none can be found anywhere.

The United States, Petitioner, supra, holds only that a particular statute allowing an appeal "to the judge of the District Court for the district" should be construed as providing for an appeal to the District Court itself. The Court stated (p. 200):

> "While it must be admitted that the proper construction of section 13 is not free from difficulty, we are not willing to change the construction we have heretofore repeatedly recognized as correct, and which we think has been adopted by Congressional . . . [reenactment]."

Moreover, in that case the proceeding involved was a judicial one cognizable by a United States District

Court. In fact, the statute specifically permitted it to be brought before a United States District Court. An extradition proceeding, on the other hand, is non-judicial and is wholly outside the competency of a federal court.

United States v. *Tom Wah, supra,* was a case involving the same statute. The Court held that a District Court could use its powers in aid of a proceeding before a United States commissioner, but the necessary basis for this holding was the Court's conclusion that the statutory provisions "in the first instance commit the jurisdiction of such cases to the United States District Courts . . . ."

5. The Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698 (1923), as we have shown, contains no provision authorizing the use by the demanding country of discovery procedures in the asylum country.

6. The statutes governing extradition (18 U. S. C. §§ 3181-95) are barren of any provision which authorizes the use by the demanding country of discovery procedures in the United States.

II

The basic principle and purpose of extradition precludes the use of subpoenas or of discovery in any form to support the request of the demanding country. For extradition presupposes that the demanding country will come to the asylum country with *prima facie* proof of criminality. It is not expected, and no procedure is provided to permit the demanding country to use the judicial apparatus of the asylum country to investigate or to establish the proof of the commission of a crime.

It is an established rule of international law that the courts of one country will not seek to enforce the penal laws of another. The *Restatement of Law—Conflict of Laws* states:

> "The criminal law of a state represents the peculiarly local policy of that state and no other state will undertake to enforce such policy by the prosecution of persons who have violated the criminal law of that state." (Section 427, comment (*a*))

It is apparent, as we have shown from the affidavit of Sidney S. Sachs, *supra,* p. 3, that the demanding country seeks exactly that: to use the judicial apparatus of the United States, the asylum country, to discover and assemble proof of the commission of crimes alleged to have been committed in Venezuela.

The nature of extradition is itself convincing proof that any type of discovery proceeding by the demanding country in the country of asylum is unwarranted. The fact that no authority can be found anywhere to justify such procedure does not create an implication that the extradition judge may therefore promulgate his own rules of discovery. Rather, it reinforces the conclusion that no power of discovery exists.

POINT IV

Even if the subpoena power were held to exist in aid of extradition proceedings, a subpoena duces tecum issued by a District Court or by an extradition magistrate on behalf of the demanding country may not be served outside the district and more than one hundred miles from the place of hearing.

Even if the District Court or the extradition judge had power to issue the subpoenas duces tecum, there is no basis in the treaty, statutes, judicial decisions or in

any rule of court which would justify their service beyond the usual territorial limits of process. Thus the Federal Rules of Civil Procedure provide in Rule 45(e)(1) for service only within the district or, if without the district, not more than 100 miles from the place of hearing.

The only conceivable basis for the service of the subpoenas upon the Banks in New York City is found in Rule 17(e)(1) of the Federal Rules of *Criminal* Procedure which states:

> "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

But, Rule 54(b)(5) of the Criminal Rules flatly states: "These rules are not applicable to extradition and rendition of fugitives . . . ."

Since the Criminal Rules are not applicable, and the territorial limitation of the Civil Rules has not been complied with, from what source does the alleged power to issue such nationwide process flow? It certainly cannot derive from general principles of law, for as the Supreme Court stated in *Georgia* v. *Pennsylvania RR.*, 324 U. S. 439, 467-68 (1945):

> ". . . Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district."

The Supreme Court has further held that a *specific exception* to this rule by congressional action is a prerequisite to the extension of the District Court's jurisdiction beyond its territorial limits. In *Ahrens* v. *Clark*, 335 U. S. 188, 190 (1948), this Court stated:

> "We start from the accepted premise that apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial."

But here there is no exception. Rather, Section 3184 itself clearly indicates that the extradition magistrate cannot issue process beyond the territorial limits of his jurisdiction. For that section authorizes the magistrate to issue a warrant of arrest *only* if the fugitive is "found within his jurisdiction."

Even if the "all writs" statute were held to grant the court power to issue subpoenas duces tecum, that power would still be subject to the general territorial limitations of the District Court. Thus in *Edgerly* v. *Kennelly*, 215 F. 2d 420, 422 (7th Cir. 1954), the Court of Appeals upheld a denial of a writ of habeas corpus, stating:

> ". . . While the section [the 'all writs' statute] augments the power of a court in cases of existing jurisdiction, it in no wise expands or extends its territorial jurisdiction."

There is another compelling reason, however, for rejecting the contention that the extradition judge had power to authorize service of the subpoenas duces tecum outside his territorial jurisdiction. For it is of notable significance that under 18 U. S. C. § 3184 extradition proceedings may be commenced before a federal justice, judge or commissioner, or before a *state court judge*. And there is nothing in the statute to indicate that any one of these officials is invested with more or less power than the other. That Congress could ever have intended that *state court judges* could issue process which would run throughout the entire nation is incredible. Clearly Congress never had such intention and never granted such power.

POINT V

Petitioner has shown no valid reason for granting certiorari and none for a summary reversal.

Petitioner argues that this Court should grant certiorari in order that the Court might aid in enforcing the obligations of the United States under the Treaty of Extradition with Venezuela (Pet. 12-13). But petitioner cannot point to any obligation of the United States under that treaty which requires the issuance of subpoenas duces tecum or any other discovery procedure, by the United States, to assist in the gathering of evidence of guilt against a fugitive. Indeed, *Article XI* of the Treaty makes it clear, as we have shown, that the evidence upon which the surrender of fugitives is based is evidence to be *produced by the demanding country.*

Petitioner also asserts that the issue he seeks to present to this Court is a grave issue affecting the international relations of this country with the republics of South America and of the world (Pet. 17). But petitioner has not pointed to a single instance in the history of this nation where a subpoena duces tecum has been issued in aid of the demanding country. Moreover, the United States Department of Justice, in its brief *amicus curiae* before the Court of Appeals for the Fifth Circuit and in its memorandum *amicus curiae* in this Court, has been unable to produce, from its vast archives covering almost 200 years, a single case in which a subpoena duces tecum had been issued in aid of a demanding country. Apparently, Venezuela, represented by petitioner, is the only demanding country which has ever sought to use the discovery procedures of the United States to gather evidence of guilt

in an extradition proceeding. Certainly the alleged needs of one petitioner do not make an issue one of grave and public importance. As this Court said in *Fields* v. *United States*, 205 U. S. 292, 296 (1907):

> "In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance."

Petitioner also contends that it is established practice in extradition proceedings for the demanding country to offer evidence in addition to that on which the original warrant of arrest was based (Pet. 14). He asserts that evidence gathered in the asylum country has been produced in other extradition proceedings (Pet. 14, 32-33). But again, petitioner fails to cite one case in which the evidence produced by the demanding country was, in fact, evidence *obtained by use of discovery procedures in the asylum country.*

None of the cases cited by petitioner (Pet. 14, 32) is relevant to the issues here presented. Thus, *Bingham* v. *Bradley*, 241 U. S. 511 (1916), involved an appeal from an order denying an application for a writ of habeas corpus by a fugitive in an extradition proceeding brought by Canada to secure his return from the United States. There was no indication whatsoever, in the record or elsewhere, of resort to any form of discovery or to the use of subpoenas duces tecum. Hence the case has no relevance.

In *McNamara* v. *Henkel*, 226 U. S. 520 (1913), as in the *Bingham* case, the proceeding also came before

the Supreme Court upon appeal from the denial of an application for a writ of habeas corpus. Extradition had been sought, by Canada, of a fugitive arrested in New York. In the record, reference is made to the oral testimony of one Canadian witness who had testified earlier before the commissioner, as to events which occurred solely in Canada, with respect to another charge. His testimony had then been read into the record in connection with the charge with which the Supreme Court was concerned. That case has no discernible bearing here.

Petitioner finally falls back on the general principle of liberal construction of treaty provisions (Pet. 14-15, 19, 27, 39). But there is no provision in the treaty of extradition which, no matter how liberally construed, suggests that the discovery power of the asylum country is available to gather evidence of the guilt of the fugitive.

Moreover, petitioner's request for a writ of certiorari ignores an important requirement long established by this Court for granting such writs: the requirement that the decision to be reviewed must not only be final, but complete. The decision of the Court of Appeals for the Fifth Circuit has not been treated by petitioner as finally determinative of the issues there presented. For petitioner is presently attempting to use alternative means to subpoena the records sought by the subpoenas quashed by the Court of Appeals.

Thus, on March 7, 1960, petitioner applied for and received from Judge Mathes, the extradition judge, permission to take the depositions of the three Banks, in New York. Petitioner then served three deposition

notices, and procured the issuance by the United States District Court for the Southern District of New York of subpoenas duces tecum directed to each of the Banks. Those subpoenas were served on March 15, 1960, and are still outstanding.

In thus pursuing its attempt to subpoena the records of the Banks through the deposition procedure, petitioner has maintained, in fact, that success in obtaining the evidence sought by these depositions would make it unnecessary for this Court to review the decision of the Court of Appeals for the Fifth Circuit. In its motion for permission to take depositions, made before Judge Mathes on March 7, 1960, petitioner's counsel stated:

> "It would seem, therefore, that there should be prompt pursuit by the plaintiff of means other than those ordered by Judge Mathes on November 25, 1959, to assure production of evidence. If other means are permitted, and are accomplished prior to Supreme Court review of the order of the Court of Appeals, such review will be mooted [*sic*]. . . ."

This Court will not allow an appeal or grant certiorari where the judgment appealed from is not both a final and complete determination of the rights of the parties. The decision of Mr. Justice Brandeis in *Collins* v. *Miller,* 252 U. S. 364 (1920), sets forth the rule in a situation very similar to the present. In that case, the relator had been arrested in extradition proceedings for three separate crimes, and the extradition judge found the evidence sufficient as to all three crimes charged. Subsequently a writ of habeas corpus was granted by the District Court as to two of the charges, but denied as to the third. The District Court, however, directed the extradition judge to hear further

evidence on the two charges with respect to which the writ was granted, but no further evidence was, in fact, heard. The fugitive then appealed to this Court from the decision of the District Court, but this Court dismissed his appeal for want of jurisdiction, on the ground that the decision was not final and complete as to the whole controversy. Mr. Justice Brandeis said (p. 370):

> "... A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. *United States* v. *Girault*, 11 How. 22, 32; *Holcombe* v. *McKusick*, 20 How. 552, 554; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4; *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429, 431; *Dainese* v. *Kendall*, 119 U. S. 53; *Covington* v. *Covington First National Bank*, 185 U. S. 270, 277; *Heike* v. *United States*, 217 U. S. 423, 429; *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339, 346. And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

Obviously, Judge Mathes, to whom the present proceeding came on remand, has not treated the order of the Court of Appeals, Fifth Circuit, as a final and complete judgment on the merits, but has *authorized further proceedings* by permitting a possible alternate means of granting petitioner's request. His action after remand, and the issuance of subpoenas duces tecum by the United States District Court for the Southern District of New York, has given petitioner another opportunity to raise the question of the power of a District Court to issue such subpoenas. The judg-

ment appealed from is not, in fact, final and complete, and therefore should not be reviewed by this Court.

Petitioner requests the unusual remedy of summary reversal, on the ground that the presence of defendant in this country is creating "popular resentment" in Venezuela and other countries (Pet. 16-17). For that reason, petitioner asks this Court to dispense with orderly procedures for the determination of judicial controversies, and in effect to bow to the clamor of the press. To reinforce his argument favoring decision by headlines, petitioner sets forth reprints of newspaper articles dealing with defendant, and the hostile sentiments against him (P. A. 4). But this Court does not base its decisions upon the opinions of crowds, recognizing the truth of the dictum of the Roman historian, Livy: "Nothing is so uncertain or so worthless as the judgments of the mob."

In short, the position of petitioner reduces to this: that the demanding country *ought to have* a power of discovery, in the United States, by subpoena duces tecum or otherwise; that such power must, therefore, be found somewhere, although petitioner has been unable to indicate any source of such power; and that this Court should declare, nevertheless, that the power does exist, because such power accords with petitioner's notions of sound political policy. We submit that if the demanding country ought to be granted the requested power as a matter of political policy, then Congress should expressly grant it, and this Court should not be asked to find it where it does not exist.

POINT VI

The petition for a writ of certiorari and for summary reversal should be denied.

Respectfully submitted,

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Dated: New York, N. Y.
May 26, 1960

APPENDIX A

EXTRADITION: STATUTORY PROVISIONS, TITLE 18, U. S. CODE*

§ 3181. SCOPE AND LIMITATION OF CHAPTER.

The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

§ 3184. FUGITIVES FROM FOREIGN COUNTRY TO UNITED STATES.

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a

* Certain of the provisions have been omitted as not applicable to this proceeding.

copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

§ 3186. Secretary of State to Surrender Fugitive.

The Secretary of State may order the person committed under section 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

§ 3188. Time of Commitment Pending Extradition.

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary

of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

§ 3190. EVIDENCE ON HEARING.

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

§ 3191. WITNESSES FOR INDIGENT FUGITIVES.

On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States.

§ 3195. PAYMENT OF FEES AND COSTS.

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

APPENDIX B

EXTRADITION: TREATY BETWEEN THE UNITED STATES AND VENEZUELA, 43 STAT. 1698 (1923)*

ARTICLE I.

Reciprocal delivery of persons charged with crimes.

The Government of the United States of America and the Government of the United States of Venezuela agree to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been convicted of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II of this Convention, while said person was actually within such jurisdiction when the crime was committed, and who shall seek an asylum or who shall be found within the territories of the other. Such surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there.

ARTICLE X.

Delivery of articles seized with person.

Everything found in the possession of the fugitive criminal at the time of his arrest, whether being the proceeds of the crime or offense, or which may be material as evidence in making proof of the crime, shall, so far as practicable according to the laws of either of the Contracting Parties be delivered up with his person at the time of the surrender. Nevertheless,

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* Certain of the provisions have been omitted as not applicable to this proceeding.

the rights of a third party with regard to the articles aforesaid shall be duly respected.

ARTICLE XI.

Territory affected.

The stipulations of this Convention shall be applicable to all territories wherever situated, belonging to either of the Contracting Parties or under the jurisdiction or control of either of them.

Requisitions.

Applications for the surrender of fugitives shall be made by the respective diplomatic agents of the Contracting Parties. In case of the absence of such agents from the country or its seat of government, or where extradition is sought from territory included in the preceding paragraph other than the United States, application may be made by superior consular officers.

Procedure.

It shall be competent for such diplomatic or superior Consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.

Documents required.

If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case.

ARTICLE XII.

Applications for provisional arrest.

If when a person accused shall have been arrested in virtue of the mandate or preliminary warrant of arrest, issued by the competent authority as provided in Article XI hereof, and been brought before a judge, or a magistrate to the end that the evidence of his or her guilt may be heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent to hold the accused for a period not exceeding two months, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused, and if at the expiration of said period of two months such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released, provided that the examination of the charges preferred against such accused person shall not be actually going on.

Release, if evidence, not produced.

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Supreme Court of the United States

OCTOBER TERM, 1960

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

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PETITIONER'S SUPPLEMENTAL MEMORANDUM AND REPLY BRIEF

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June 7, 1960

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 892

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents

PETITIONER'S SUPPLEMENTAL MEMORANDUM AND REPLY BRIEF

SUPPLEMENTAL MEMORANDUM

The petition for a writ of certiorari (pp. 10-11) and the brief in opposition for the three respondent banks (pp. 6-7) indicate the pendency of deposition proceedings in New York that were initiated by petitioner in order to reach the same witnesses and documentary evi-

dence that are involved in the present matter before this Court. We wish to advise the Court fully of the current status of those proceedings.

The earlier papers filed in this Court disclosed that Judge Mathes granted permission to this petitioner to take the depositions of the four New York banks (respondent banks and Chemical Bank New York Trust Company); that deposition notices were served; that, on proof of notice, subpoenas duces tecum were issued by the clerk of the United States District Court for the Southern District of New York for the production of the specified bank records at the depositions. The three respondent banks and two depositors, Napoleon Dupouy and Silvio Gutierrez, submitted applications in that court to quash the subpoenas. Their motions were argued before Chief Judge Ryan on April 14 and May 13—briefs having been submitted between the two dates. On May 13 Chief Judge Ryan issued his opinion and on May 16 entered his order denying the motions to quash and continuing the depositions until June 22, 1960. The movants there have filed notices of appeal and, on their motion, the United States Court of Appeals for the Second Circuit entered an order on May 18 that the appeals be briefed by June 13 and argued on June 16. An application has been submitted to the Court of Appeals for a stay of the deposition proceedings pending determination of the appeals, and this, too, has been set down for argument on June 16. If this petitioner should win on those appeals, appellants presumably will seek a further stay pending submission of that case to, and its determination by, this Court.

* * *

REPLY BRIEF

Respondent banks argue that the decision to be reviewed "must be not only final, but complete," and that the judgment of the Fifth Circuit is not "complete" because the deposition proceedings pending in New York are an alternative means of obtaining the relief passed upon by the Fifth Circuit (brief, p. 43). Respondents cite *Collins* v. *Miller*, 252 U.S. 364, in support of this argument. *Collins* v. *Miller* arose from an extradition case on application for a writ of *habeas corpus*. The writ was sought on the ground of violation of treaty rights and on the ground that defendant was not allowed to introduce certain evidence on the three charges against him. The District Judge denied the application for *habeas corpus* so far as the first charge was concerned, and remanded the matter to the extradition judge for the taking of evidence relating to the second and third charges. This order, said this Court, amounted to a refusal to pass on the application, so far as the second and third charges were concerned, until further proceedings had taken place, and was not final so far as the second and third charges were concerned. Since only one of the three grounds for the writ had been passed on, the order was not ripe for appeal. The case deals with the principle of finality of lower court judgments. The decision, therefore, went on the ground that, *on appeal*, the judgment below must be final to be appealable to this Court. There is, of course, no such limitation upon the power of this Court to review by writ of certiorari decisions of the courts of appeals. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *United States* v. *Gulf Refining Co.*, 268 U.S. 542, 544-45.

But in any event the judgment below is both final and complete. In contrast to *Collins* v. *Miller*, there

are no unresolved issues hanging fire before any judge or court, so far as the subpoenas issued by Judge Mathes are concerned. He and the Court of Appeals for the Fifth Circuit fully disposed of the questions before them and the subpoenas issued in Miami have been quashed. New proceedings invoking different procedure were then initiated in New York, and are still pending. But the subpoena procedure on which Judge Mathes and the Fifth Circuit passed cannot be reopened there or anywhere until this court acts. Lower court action is concluded, no matter what action may be taken by other federal courts in a different proceeding. In other words, the action below is "complete."

Three additional arguments advanced in the banks' brief in opposition, and one advanced in Dupouy's brief, call for clarification.

At pages 3 and 36 of their brief the banks urge that the subpoenas signed by Judge Mathes are merely investigatory and are designed to facilitate an "inquisition". While this point was not pressed below, suffice it to say that 300 pages of documentary evidence were before Judge Mathes when the subpoenas were issued, that many times that volume have been submitted to him since then, providing more than ample showing, in conjunction with charges contained in the complaint, of the pertinence of the documents specified in the subpoenas. Judge Mathes was satisfied with the showing to support the subpoenas and noted that the subpoenaed evidence was intended "to show that certain funds were taken out of the country, namely the Republic of Venezuela, and brought to this country and channeled back to the defendant for his use and benefit." Mathes, J., transcript of hearing Dec. 14, 1959, p. 177. Chief Judge Ryan has rejected a similar attack

on the depositions in New York, quoting with approval in his opinion the foregoing comment of Judge Mathes.

Respondent Dupouy misrepresents to this Court the purpose of the subpoenas by making the wholly unfounded statement that petitioner must intend the subpoenaed evidence to be used in the Venezuelan trial rather than in the extradition case (brief, p. 3). Respondent includes in his Appendix 2 excerpts from the transcript of the March hearing before Judge Mathes. The Court will observe that the transcript quoted in respondent's Appendix 2, except for the last excerpt, deals with the formal submission of the evidence then available in translation, and does not bear at all on the status of the subpoenaed evidence. In the last excerpt it was Judge Mathes, not counsel for this petitioner, who spoke of using additional evidence in rebuttal. Aware of the uncertainty created by this colloquy, petitioner's counsel made it plain at the hearing on May 10 that he would use the subpoenaed evidence in the extradition case to support the charges:

> "MR. SACHS: . . . We simply want your Honor to know that if we get the information from the banks which we seek, at that time our plan is to bring it before your Honor, and at that time we may feel that we should argue that it should be introduced in evidence as of the time when we first start it. But that obviously is no problem that need concern your Honor at this point. It is something that may occur in the future; but we wanted your Honor to understand that that is our plan.
>
> "THE COURT: Well, do you mean by that that you expect to reserve the right to move to reopen your case in chief to include that evidence? I am referring to those bank depositions, so-called, if and when available.
>
> * * *

"THE COURT: You would like to reserve the right to move to reopen your case in chief, is that it?

"MR. SACHS: Yes, sir.

"MR. WALTERS [counsel for defendant]: Of course, I will kick like a steer regarding that, your Honor, because when a case is rested, it is rested. It is a highly unusual procedure.

"THE COURT: Well, it may be a matter of order of proof. It may be a part of the case in chief, or it might be offered in rebuttal, I assume.

"MR. SACHS: That is correct, depending on what the circumstances are then." Transcript of hearing before Mathes, J., May 10, 1960, pp. 66-67.

Respondent banks assert (brief, p. 22) that the "judicial functionaries" whose powers and duties are referred to in Article XI of the Treaty, 43 Stat. 1704, are those of Venezuela rather than of the United States. Respondents have been seriously misled. The reference to "judicial functionaries" has a simple purpose: to make it clear that procedures are to be prescribed by the judicial officers, rather than the political officers, of "the Government of whom such request [of extradition] is made," in order to assure that the laws of the asylum country governing such proceedings will be faithfully followed. This purpose may be seen more clearly by comparing Article XI of the Venezuelan Treaty with corresponding provisions of other extradition treaties:

VENEZUELA

"ARTICLE XI.

* * *

"It shall be competent for such diplomatic or superior Consular officers to ask and obtain the

preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. *The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.*" (emphasis supplied) Extradition Treaty-Venezuela, Jan. 19, 1922, 43 Stat. 1704-05.

* * *

GERMANY

"ARTICLE X.

* * *

"The arrest of the fugitive shall be brought about *in accordance with the laws of the party to which the request is made,* and if, after an examination, it shall be decided, *according to the law and the evidence,* that extradition is due, pursuant to this Treaty, the fugitive shall be surrendered *according to the forms of law prescribed in such cases.*" (emphasis supplied) Extradition Treaty-Germany, July 12, 1930, 47 Stat. 1869.

* * *

SIAM

"ARTICLE XI.

* * *

"It shall be competent for such diplomatic or superior consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought, *whereupon the judges and magistrates of the two Governments shall respectively have power and authority, upon complaint made under oath, to issue a warrant for the apprehension of the person charged, in order that he or she may be brought before such judge or magistrate,* that the evidence of criminality may be heard and considered and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the

> examining judge or magistrate to certify it to the proper executive authority, that a warrant may issue for the surrender of the fugitive." (emphasis supplied) Extradition Treaty-Siam, Dec. 30, 1922, 43 Stat. 1752.

These provisions make it clear that the "judicial functionaries" provision of the Venezuelan Treaty refers to those judicial officers before whom the accused is brought—those of the asylum country.

On the basic question of the subpoena power the banks' argument obscures the point at issue by a fundamental *non sequitur*. An extradition proceeding, it states as its premise, is not an exercise of the judicial power of the United States as defined in Article III of the Constitution (brief, pp. 25-30). *Therefore,* it concludes, the power to issue subpoenas duces tecum in aid of the proceeding does not exist (brief, pp. 30-37).

Putting aside the question whether the premise is or is not correct, the conclusion does not follow in either case. The power to subpoena can exist and has been upheld in aid of a proceeding which is not an exercise of Article III power. This has been done in connection with preliminary proceedings before commissioners. *United States* v. *Beavers,* 125 Fed. 778 (S.D.N.Y. 1903); *United States* v. *Stern,* 177 Fed. 479 (E.D. Pa. 1910); see *In re Subpoenas Duces Tecum,* 248 Fed. 137 (E.D. Tenn. 1916) (opinion by Judge, later Justice, Sanford); Rule 17, F. R. Crim. P. It has also been done in connection with the determination of claims against the United States. *Kamen Soap Products Co.* v. *United States,* 110 F. Supp. 430 (Ct. Cl. 1953).

The question to be decided is whether the subpoena power exists here. The claim that it does has ample

basis in the Treaty, the extradition statute and the all-writs statute. That the question needs to be settled is shown by the fact that two district judges and a Court of Appeals judge believe that the power exists and two Court of Appeals judges disagree. That it is an important question does not seem arguable in the light of the statement of the Solicitor General on behalf of the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 615

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

No. 686

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; and NAPOLEON DUPOUY,

Respondents.

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS BY GENERAL MARCOS PEREZ JIMENEZ

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 77

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

No. 688

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; and NAPOLEON DUPOUY,

Respondents.

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS BY GENERAL MARCOS PEREZ JIMENEZ

GENERAL MARCOS PEREZ JIMENEZ, by and through his undersigned counsel, moves this Honorable Court to grant him leave to appear as amicus curiae in the above-styled proceedings.

These matters originated collateral to a complaint for extradition of GENERAL MARCOS PEREZ JIMENEZ, filed by MANUEL ARISTEGUIETA, the petitioner (plaintiff), in the United States District Court for the Southern District of Florida, Miami Division, on August 24, 1959. Connected with the extradition matter, the petitioner, MANUEL ARISTEGUIETA, has endeavored by various means to seek the production of bank records and accounts of the defendant, MARCOS PEREZ JIMENEZ, and other persons, including friends and family of the defendant, for the purpose of discovery and alleged possible use in connection with the extradition proceedings. In the first endeavor to secure the records, subpoenas duces tecum were issued by the extradition judge in Miami, requiring the respondent banks to appear in the Florida District Court and produce certain documents dealing with the accounts of the individuals named. THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION, THE ROYAL BANK OF CANADA and depositors, SILVIO GUTIERREZ, NAPOLEON DUPOUY, PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, moved to quash the subpoenas and then appealed to the Fifth Circuit Court of Appeals the denial of the motion to quash by the extradition judge. On February 1, 1960, the Court of Appeals for the Fifth Circuit took jurisdiction of the appeal and in a per curiam decision held that the order denying the motion to quash should be vacated and the subpoenas quashed. The Court in its order stated:

> "The Court decides that the order denying motions to quash the subpoenas duces tecum is final and appealable." *Note No. 1

The petitioner, MANUEL ARISTEGUIETA, then filed a petition for writ of certiorari to the Supreme Court of the United States, which petition was granted and the hearing set for the fall term of 1961 (case No. 77). Thereafter the plaintiff in the extradition case, MANUEL ARISTEGUIETA, endeavored to obtain the same bank

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*Note No. 1—*Aristeguieta v. Jimenez*, 5th Cir. 1960, 274 F2 206.

records by alternate means and secured from the Honorable William C. Mathes an order granting leave to take depositions of the same banks under Rule 26 of the Federal Rules of Civil Procedure. Subpoenas pursuant to said order were issued by a judge of the District Court for the Southern District of New York. THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION, THE ROYAL BANK OF CANADA and depositors SILVIO GUTIERREZ and NAPOLEON DUPOUY moved to quash the subpoenas and then appealed the order denying the motion to quash to the Circuit Court of Appeals for the Second Circuit. On December 30, 1960, the United States Court of Appeals for the Second Circuit reversed the decision of the court below and ordered the subpoenas quashed. The petitioner, MANUEL ARISTEGUIETA, has filed a petition for writ of certiorari which has been granted by the Supreme Court (case No. 688), and the case consolidated with the writ of certiorari originating in the Court of Appeals for the Fifth Circuit. Both matters have been jointly set for hearing in the fall term (cases No. 77 and No. 688).

The defendant below, MARCOS PEREZ JIMENEZ, participated in opposition only in the matter relating to the order of Judge Mathes, permitting the taking of depositions for discovery purposes, and chose rather than to move for the quashing of the subpoenas in New York to pursue an alternate method of filing a motion for a protective order, seeking to prohibit the taking of the depositions. An appeal was taken to the United States Court of Appeals for the Fifth Circuit from the order denying the motion for protective order. On April 25, 1961, the Court of Appeals for the Fifth Circuit dismissed the appeal and ordered:

> "This Court has jurisdiction of appeals 'from all final decisions of the district courts of the United States' in this Circuit, and from certain 'interlocutory orders of the district courts of the United States.' No statute, however, gives this Court jurisdiction of an appeal from an order, whether interlocutory or final, of a magistrate in

an extradition proceeding. For lack of jurisdiction, therefore, the attempted appeal is dismissed." (Case No. 18408, United States Court of Appeals, Fifth Circuit)

It would appear that the Court's decision regarding its jurisdiction conflicts with its earlier decision. *Note No. 1

The Court of Appeals for the Fifth Circuit observed in its opinion that the Supreme Court had granted certiorari to review the prior decisions of both the Fifth Circuit and the Second Circuit and that most of the disputed questions of law would probably be settled on such review.

The present posture of the extradition proceedings is that both the plaintiff and the defendant have presented their evidence and that the plaintiff has been ordered to present his rebuttal evidence on June 12, 1961. The petitioner, MANUEL ARISTEGUIETA, in the extradition proceedings has represented that he has rested his case subject to a motion to reopen in the event the ruling of the Supreme Court should make the bank records available. The only factor that prevented the defendant, MARCOS PEREZ JIMENEZ, in participating actively in case No. 683 heretofore was his choice of procedures to pursue his remedies in the Fifth Circuit Court of Appeals rather than the Second Circuit Court of Appeals. The appeal in the second circuit proceeded more rapidly than in the fifth circuit. It is unlikely that a petition for writ of certiorari could be processed in sufficient time to result in a joinder of the cases. Pursuing a petition for writ of certiorari from the decision of the fifth circuit at this point would not only be futile because of the time involved but would be burdensome to the Court and the parties concerned. It would also appear that the interests of the defendant and the Court

*Note No. 1—*Aristeguieta v. Jimenez*, 5th Cir. 1960, 274 F2 206.

would be adequately served under the circumstances by permitting him to file a brief as amicus curiae in the pending appeals before the Supreme Court. The defendant did not participate in the appeal leading to the petition for writ of certiorari in case No. 7 as this case did not involve the use of discovery procedures under the Federal Rules of Civil Procedure, which is the main basis for the defendant's opposition. The defendant, MARCOS PEREZ JIMENEZ, alleges that in addition to his interests in the proceedings before this Court, which are obvious, his participation in the proceedings as amicus curiae is essential to the fair administration of justice for the following reasons:

1. That the petitioner, MANUEL ARISTEGUIETA, has stated in the extradition proceedings that notwithstanding the resting of his case he intends to move for the reopening of the case in the event the United States Supreme Court makes the bank records available for his inspection. The extradition judge has set June 12, 1961, as the date when rebuttal evidence must be submitted and the case concluded. The hearing on the appeals will not take place until the fall term of 1961 in the Supreme Court. In the light of these circumstances, it therefore appears that the issues are moot, or in any event will become moot before a hearing on the merits in the appeals. This question is relevant to proper disposition of the case and is of major interest to the defendant, MARCOS PEREZ JIMENEZ. It does not appear from the record that the question has been adequately presented by the parties.

2. The defendant, GENERAL MARCOS PEREZ JIMENEZ, has placed his major opposition to the proposed depositions on the ground that there is no provision in foreign extradition proceedings for the permitting of discovery depositions under Rule 26 of the Federal Rules of Civil Procedure as investigative aid to the demanding government. On the record of appeal it does not appear that this question which is relevant to a

proper disposition of the case has been adequately presented by the parties in a manner which would protect the best interests of the defendant.

Respectfully submitted,

David W. Walters

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Miami 32, Florida
Attorney for General Marcos
Perez Jimenez

CERTIFICATE AS TO SERVICE OF COPIES OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS BY GENERAL MARCOS PEREZ JIMINEZ

STATE OF FLORIDA }
COUNTY OF DADE } ss.

DAVID W. WALTERS, being first duly sworn, on oath deposes and says that he is attorney for Marcos Perez Jimenez; that on the 22 day of June, A. D. 1961, he mailed two (2) copies of motion for leave to appear as amicus curiae in support of the respondents by General Marcos Perez Jimenez to each of the following at their respective addresses:

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David W. Walters

David W. Walters

Subscribed and sworn to before me
at Miami, Florida, June 6th, 1961.

A. Neuburger

Notary Public, State of Florida at Large
My Commission Expires Oct. 2, 1961
Bonded by American Surety Co. of N. Y.

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Nos. 1 and 2

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Supreme Court of the United States

OCTOBER TERM, 1960 63

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Petitioner*,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

PETITIONER'S MEMORANDUM RESPECTING MOOTNESS AND DEFERRAL OF CONSIDERATION

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Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 5 and 43

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Petitioner,*

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

PETITIONER'S MEMORANDUM RESPECTING MOOTNESS AND DEFERRAL OF CONSIDERATION

These consolidated cases arise out of an international extradition proceeding in the United States District Court for the Southern District of Florida held pursuant to 18 U.S.C. § 3184 and the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698. The petitioner here, the Consul General for the Republic of Venezuela in Miami, Florida, acting on behalf of his Government, is the plaintiff in the

extradition case. The defendant is Marcos Perez Jimenez, former President of Venezuela.

The issues in these cases relate to the power of the United States District Judge conducting the extradition proceeding, or a United States District Court acting in aid of the judge, to compel the production of documentary evidence relevant and material to the plaintiff's case and the appropriate mode of and circumstances for the exercise of such power. Events since this Court on March 20, 1961, granted certiorari to review judgments of the Courts of Appeals for the Second and Fifth Circuits dealing with these issues raise a serious question of mootness and suggest at a minimum that consideration of the cases should be deferred.

Defendant in the extradition proceeding was charged with, *inter alia*, a series of financial crimes in abuse of his office. Evidence forwarded to the United States by the prosecuting authorities in Venezuela indicated that evidence of such crimes was to be found in the records of the accounts of the defendant and members of his family and confederates in the First National City Bank of New York, the New York Branch of the Royal Bank of Canada, the French American Banking Corporation in New York and the Chemical Bank New York Trust Company. Plaintiff in the extradition proceeding therefore moved Judge William C. Mathes, then hearing the extradition proceeding in the District Court for the Southern District of Florida, for orders in the nature of subpoenas under Rule 17 of the Federal Rules of Criminal Procedure commanding an official of each of the banks to appear in court with the record of the accounts of the defendant and other designated persons. The banks, with

the exception of the Chemical Bank, and certain of the persons designated, including at least one who claimed to be a depositor in the Chemical Bank, moved to quash the subpoenas. Their motions were denied. Appeals were taken, and in a brief per curiam order, with no statement of reasons, the Court of Appeals for the Fifth Circuit reversed the order denying the motions to quash and ordered the four subpoenas quashed. 274 F. 2d 206. Petitioner applied to this court for a writ of certiorari.

Since no opinion was written, it was impossible to ascertain the ground of the Court of Appeals' decision. The appellants had contended both that there was no power whatever to issue subpoenas, and that the subpoenas could not be effectively served more than 100 miles outside of the district in which the proceeding was conducted. Thus, one possible ground of decision would not have denied to the judge conducting the extradition proceeding the power to compel the production of evidence by some means other than a subpoena reaching more than 100 miles out of the district in which he sat.

Therefore, petitioner, as plaintiff in the extradition proceeding, moved for permission to proceed as upon deposition in accordance with the Federal Rules of Civil Procedure in order to have produced in New York the same bank records that were covered by the quashed subpoenas. The motion was granted, and notices of deposition were served; subpoenas issued out of the United States District Court for the Southern District of New York.

Again there were motions to quash by the three banks that had resisted the original subpoenas and by

depositors, including at least one person claiming to be a depositor in the Chemical Bank. The motions were denied, 183 F. Supp. 865, and the banks and two depositors appealed to the Court of Appeals for the Second Circuit. The Second Circuit reversed in an opinion expressing grave doubts as to whether there was power to compel the production of evidence in an extradition case at the behest of the demanding government and holding that in any event any such power as did exist was set about with such restrictions as to make its exercise inappropriate in this case. 287 F.2d 219.

Petitioner applied to this Court for a writ of certiorari to have this judgment reviewed together with the judgment of the Fifth Circuit. On March 20, 1961, the Court granted both petitions and consolidated the cases.

Since that time, on June 16, 1961, Judge George W. Whitehurst, who had succeeded Judge Mathes in the conduct of the extradition proceeding, announced from the bench his decision that the evidence submitted on behalf of the plaintiff in support of the charges of financial crimes against the defendant was sufficient to justify his surrender to the Venezuelan authorities. In accordance with 18 U.S.C. § 3184, he at once ordered the defendant committed to await action by the Secretary of State, and on June 23, 1961, he formally certified his finding that the evidence was sufficient to the Secretary of State, and entered his certification as the final order in the extradition proceeding.

There is no appeal from the final decision of a judge or other magistrate in an extradition case under 18 U.S.C. § 3184. *Collins* v. *Miller,* 252 U.S. 364 (1920).

If the magistrate makes a finding of probable cause to believe the defendant guilty of crimes named in the applicable treaty he is to certify the same to the Secretary of State, together with all the evidence he has received, and commit the defendant. The Secretary of State makes the final determination whether to surrender the defendant to the authorities of the demanding government. 18 U.S.C. § 3186.

However, the judicial finding that results in the defendant's commitment and is a prerequisite to his surrender is frequently tested by the filing of a petition for a writ of habeas corpus challenging the detention of the defendant under the extradition magistrate's warrant of commitment. The defendant Perez Jimenez has taken steps to challenge Judge Whitehurst's determination of his extraditability by means of such a petition for a writ of habeas corpus.*

So general has the custom become of seeking review of a judge's final determination in an extradition proceeding by means of habeas corpus that the two proceedings virtually coalesce. Although the scope of review is limited, *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925), the habeas corpus proceeding sometimes results in orders in the nature of remands. Thus in *Application of D'Amico*, 185 F. Supp. 925 (S.D.N.Y. 1960), *appeal dismissed sub nom. United States ex rel D'Amico* v. *Bishopp*, 286 F.2d 320 (2d Cir. 1961), there was, on habeas corpus, a remand to the extradition

* The defendant had previously filed a petition seeking his release from alleged detention on the warrant of arrest on which he was brought before the judge for the extradition hearing. He has now asked leave to amend that petition so as to attack on various grounds, including insufficiency of the evidence, his detention on Judge Whitehurst's warrant of commitment.

magistrate to make more specific findings, and both the plaintiff and the defendant were to have the opportunity upon such remand to introduce further evidence. In *Collins* v. *Miller*, 252 U.S. 364 (1920), this Court dismissed an appeal from a somewhat similar remand to an extradition magistrate which was ordered on habeas corpus.

Likewise, the Secretary of State has on occasion remanded extradition proceedings for the receipt of further evidence. 4 Hackworth, *Digest of International Law* 121-23, 128, 129 (1942).

In these circumstances petitioner submits that these cases are not now moot. There remains "an actual controversy, and adverse interests," *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43 (1944), with respect to the availability of the bank records for use as evidence in the extradition proceeding. It would not be appropriate to require petitioner, as the representative of a sovereign nation claiming rights under a treaty, to relitigate the entire controversy from the beginning should the need arise for asserting actively again his interest in securing the records. The controversy, however, is not now live or pressing. It may become live again if, as a result of the habeas corpus proceeding or otherwise, the extradition proceeding is reopened or renewed.

Unless and until that happens, however, there is no urgent need for the Court to resolve the issues raised by that controversy. Therefore, petitioner respectfully suggests that the Court retain the cases on its docket and postpone briefing and argument until it is clear whether the extradition proceeding under 18 U.S.C. § 3184 is to be reopened or renewed, in which

case there would be need for this Court's determination of the "actual controversy, and adverse interests" regarding the production of the bank records. Petitioner would keep the Court advised as to the course of further litigation and any relevant action by the Executive.

If the Court is of the view that the case is now moot, petitioner submits that the Court should follow its customary practice by vacating the judgments below and remanding No. 5 to the Court of Appeals for the Fifth Circuit and No. 43 to the Court of Appeals for the Second Circuit, with instructions to each of those courts to order the proceedings with respect to the subpoenas and the depositions dismissed, so that none of the orders or judgments below will have the effect of res judicata. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

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Nos. 5 AND 42

Supreme Court of the United States

OCTOBER TERM, 1961

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONS, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

MEMORANDUM OF RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA WITH RESPECT TO PETITIONER'S MEMORANDUM CONCERNING MOOTNESS AND DEFERRAL OF CONSIDERATION

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

RESPONDENT BANKS MEMORANDUM WITH RESPECT TO PETITIONER'S MEMORANDUM CONCERNING MOOTNESS AND DEFERRAL OF CONSIDERATION

POINT ONE

The Respondent banks submit that these cases are now moot and that this court should so hold.

The subpoenas duces tecum issued in Miami, ordered quashed by the United States Court of Appeals for the Fifth Circuit, and the subpoenas duces tecum issued in New York, ordered quashed by the United States Court of Appeals for the Second Circuit, all required the production of records of bank accounts of

approximately twenty-one named persons and corporations covering a period of about ten years. These records are voluminous and include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence.

From the sweeping demands of these subpoenas and from the affidavit of Mr. Sidney S. Sachs, one of the counsel for Venezuela, it is abundantly clear that Venezuela is attempting to institute a basic innovation which would permit it to conduct the equivalent of a grand jury inquisition in the United States in order to discover, here, new evidence against the defendant, Jimenez, and others not defendants in the extradition proceeding. Thus in paragraph 7 of his affidavit, sworn to November 25, 1959, Mr. Sachs states:

> "The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant. It is expected that it will also disclose the method of the illegal concert of action between the *defendant and others,* as well as the extent and nature of a means for concealment of his illegal conduct adopted by the defendant." (Emphasis added)

Venezuela has failed to show any need whatsoever for this extensive inquisition. Indeed, it rested its case long ago in the extradition proceeding, thus indicating that the evidence presented was regarded as sufficient. This appears from the transcript of the hearing in Miami, Florida, before Judge Mathes on May 10, 1960 (p. 56):

> "The Court: Has the plaintiff rested yet?
> "Mr. Sachs [Counsel for Venezuela]: Yes, we have rested. We now rest. . . ."

Further, on the appeal before it the Court of Appeals for the Second Circuit carefully examined the record to see if any showing of need for the sweeping evidence demanded, had been made. And on the basis of that examination the Court ruled that there had been no showing of need, stating:

> "... If, as Venezuela has indicated, it is willing to rest its case upon the record already made, the additional evidence sought would appear to be merely cumulative. Nor has any showing been made as to how $4,400,000 will exceed in legal effectiveness, insofar as meeting the statutory requirement of over $200 is concerned, the $500,000 already claimed by Venezuela. Since at this stage there is *no present showing of need,* it would be unwise in the absence of more specific statutory command or direction to sanction such broad deposition proceedings as are now sought." (Emphasis added)

Similarly, in the Fifth Circuit proceeding Venezuela had made no showing of need, although its demands were equally sweeping.

In accordance with 18 U. S. C. § 3184, Judge George W. Whitehurst who had succeeded Judge Mathes in the conduct of the extradition proceeding, formally certified to the Secretary of State his finding that the evidence was sufficient to warrant extradition. In his certification to the Secretary of State, Judge Whitehurst stated, among other things:

> "11. Paragraphs 15.B and 15.C (supplemented by Paragraph 15.D) of the aforesaid Second Amended Complaint set forth charges that the defendant is guilty of certain financial crimes, each such crime being separately and independently

alleged. . . . Each one of the crimes alleged constitutes embezzlement or criminal malversation by a public officer, as provided for in paragraph 14 of Article II of the aforesaid Treaty, or constitutes fraud or breach of trust by an agent or by one in a fiduciary position, as provided for in paragraph 20 of Article II of the aforesaid Treaty. Likewise such of these crimes as are specified in Paragraph 15.D(3) of the aforesaid Second Amended Complaint constitute in each case the receipt of money or valuable securities knowing the same to have been unlawfully obtained, as provided for in paragraph 18 of Article II of the aforesaid Treaty. In the case of each alleged crime the amount embezzled, misappropriated or received is more than the minimum amount specified in each of these paragraphs of Article II of such Treaty.

"12. *The evidence submitted herein sustains each of the charges of financial crimes so alleged, according to the probable cause standard contemplated by 18 U. S. C. § 3184 and Article I of the aforesaid Treaty.* The defendant, in the several public offices he held during the period referred to in Paragraphs 15.B, 15.C and 15.D of the aforesaid Second Amended Complaint, was charged with responsibility for the administration of public funds, property and contracting authority in the Government of the Republic of Venezuela; *and the evidence shows probable cause to believe that, in his administration thereof, he secured private financial benefit as alleged in such Complaint as to each such crime.*" (Emphasis added)

Venezuela now urges that the cases before this Court are not yet moot because of the possibility that the pending habeas corpus proceeding may result in a remand to the extradition magistrate for the introduction of additional evidence. It is difficult to conceive of such possibility.

The limited scope of review by writ of habeas corpus in an extradition proceeding was forthrightly stated by this Court as long ago as 1896 in *Ornelas* v. *Ruiz,* 161 U. S. 502, at p. 508:

> "By repeated decisions of this court it is settled that a writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus.*"

It is patent from the voluminous evidence introduced by Venezuela, the certification of Judge Whitehurst and the decision of the Court of Appeals for the Second Circuit that there is scant possibility that the habeas corpus proceeding could result in a remand for the purpose of permitting Venezuela to introduce additional evidence. Clearly, Judge Whitehurst had before him competent legal evidence on which to base his judgment and finding of probable cause.

Moreover, Venezuela has been unable to cite a single international extradition case comparable to the instant cases in which a habeas corpus proceeding resulted in a remand for the purpose of permitting a demanding government to introduce additional evidence. And respondents have been unable to find one.

Application of D'Amico, 185 F. Supp. 925 (S. D. N. Y. 1960), appeal dismissed sub. nom. *United States ex rel D'Amico* v. *Bishopp,* 286 F. 2d 320 (2d Cir. 1961)

the only case cited by Venezuela for this proposition was crucially different from the present cases. For there the Commissioner sitting as an extradition magistrate had neglected to make an independent finding of probable cause and accordingly the District Court felt compelled to remand for the taking of additional testimony by the accused and by the demanding government. How different from Judge Whitehurst's careful and detailed certification!

POINT TWO

If this court should, on the present record, refuse to find these cases moot, then these respondents agree that the court should retain the cases on its docket but postpone briefing and argument pending the outcome of the habeas corpus proceeding by Marcos Perez Jimenez.

Dated: New York, N. Y.
August 24, 1961

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OCTOBER TERM, [redacted]63

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Petitioner,

v.

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

MEMORANDUM FOR RESPONDENT, SILVIO GUTIERREZ, RESPECTING MOOTNESS AND IN OPPOSITION TO PETITIONER'S SUGGESTION OF DEFERRAL OF CONSIDERATION

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OCTOBER TERM, 1961

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The issue in these cases actually is whether, in the absence of an authorizing statute, a court has the power to order the taking of pre-trial depositions in aid of extradition. The Court of Appeals for the Second Circuit held that under the circumstances revealed by the record, the

court lacked such power and that the demanding state had no need for these depositions and quashed subpoenae *duces tecum* issued in purported aid thereof (274 F. 2d 206; cf. *Miner* v. *Atlass*, 363 U. S. 641).*

As stated at page 4 of petitioner's memorandum, it has since been held that the evidence submitted on behalf of the petitioner was in fact sufficient to justify extradition and a final order to that effect has been entered in the extradition proceedings from which, concededly, there is no appeal (*Collins* v. *Miller*, 252 U. S. 364).

The conjectural possibility that there may be resort to *habeas corpus* proceedings by the accused can, at best, involve only the questions of jurisdiction; whether the offense charged is within the treaty and whether there was any evidence at all upon which a finding could have been made that there was reasonable ground to establish the criminality of the accused for extradition purposes. The number of the charges in the indictment is immaterial if the accused was tried upon one of the charges for which he is to be surrendered. (*Fernandez* v. *Phillips*, 268 U. S. 311; *Ex Parte Bryant*, 167 U. S. 104). This Court has held that the weight and effect of competent evidence will not be considered upon a writ of *habeas corpus*, which can not perform the office of an appeal or a writ of error. (*In re*

---

* Judge Albert B. Maris, in an article on "Federal Procedural Rule-Making" (47 A.B.A. Journal 772, 775) describes the necessity which arose for this Court to promulgate new rules under its Congressional authority "resulting from the decision of the Supreme Court in *Miner* v. *Atlass* holding invalid the local rules of many district courts which had authorized depositions and discovery procedure in admiralty cases."

Luis Oteiza & Cortes, 136 U. S. 330; *Grin* v. *Shine*, 187 U. S. 181).

The petitioner has never claimed that the depositions sought were needed to establish jurisdiction or the criminality of the accused for extradition purposes and the court below determined that the evidence sought would be "merely cumulative" (Appendix 1, p. 17). Accordingly, the questions heretofore sought to be reviewed by this Court cannot properly be involved in any future *habeas corpus* proceeding or any remand that may be directed therein, and these appeals have become abstract and moot.

Even assuming a future reopening or renewal of the extradition proceeding, it is impossible to say what the controversy or adverse interests would then be or whether these appeals would even be germane to the issues then remaining, and the retention of these cases by this Court for such eventuality would necessarily be premised upon wholesale conjecture and speculation.

Walling v. *Helmerich & Payne*, 323 U. S. 37, relied upon by the petitioner, is utterly inapplicable and stands only for the proposition that where there is a controversy over the legality of an activity which is sought to be restrained or punished, the voluntary discontinuance of such activity does not necessarily remove the case from the ambit of judicial power. There is no similarity whatever between the legal situation involved in that case and that which is involved in the cases at bar.

Here, the entry of a final and non-appealable order, which has terminated the quasi-judicial extradition proceedings formerly pending when certiorari was granted, has certainly rendered abstract the question of the right to

a pre-trial deposition for use in a proceeding already litigated, adjudicated and terminated. The cases at bar, therefore, do not present an actual controversy and they should be dismissed as moot.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

REPLY MEMORANDUM OF PETITIONER RESPECTING MOOTNESS AND DEFERRAL OF CONSIDERATION

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

REPLY MEMORANDUM OF PETITIONER RESPECTING MOOTNESS AND DEFERRAL OF CONSIDERATION

This memorandum will serve both (a) to reply to the memoranda respecting mootness filed by the respondent banks and by the respondent Silvio Gutierrez and (b) to advise the Court as to the current status of the matter in controversy. See Petitioner's Memorandum Respecting Mootness at 7.

I

STATUS OF HABEAS CORPUS PROCEEDING

At the time of the filing of Petitioner's Memorandum Respecting Mootness the extradition defendant had asked leave, in the United States District Court for the Southern District of Florida, to file an amended petition for writ of habeas corpus attacking the legality of Judge Whitehurst's determination of probable cause and his order of final detention of the defendant in the extradition proceeding. See Petitioner's Memorandum Respecting Mootness at 5.

Since then leave was granted to file the amended petition, an order to show cause thereon was issued, returns were made, a hearing held, and on August 24, 1961, after such hearing, Judge William A. McRae, Jr., United States District Judge, entered an order dismissing the petition and discharging the order to show cause. *Docket No. 10,662-M-Civil, United States District Court for the Southern District of Florida.* At the same time the extradition defendant gave notice of appeal to the United States Court of Appeals for the Fifth Circuit, and steps toward the perfecting of that appeal are now under way. The extradition defendant is at liberty on bail pending further order of court.

II

ISSUES IN HABEAS CORPUS PROCEEDING

In the amended petition for habeas corpus, as amplified in the brief and the traverses filed on behalf of the extradition defendant, it is contended, among other things, (1) that Judge Whitehurst's finding of probable cause is not supported by the evidence adduced at the extradition hearing and (2) that Judge Whitehurst had no jurisdiction on the ground (among others) that

Judge Mathes, whom Judge Whitehurst had succeeded as judge in the course of the extradition proceeding, was never legally divested of jurisdiction. On these and other grounds the extradition defendant, in habeas corpus, prays that the matter be remanded to *Judge Mathes* for further proceedings.

In the argument that Judge Mathes never lost jurisdiction in the extradition case and that Judge Whitehurst therefore had no power to act therein, and in other related arguments, the extradition defendant asserts as his premise that, under the extradition statute, an extradition judge does not act as a "court." From this premise he urges that judges in extradition cannot be changed in the course of a proceeding as are judges in "courts." The premise asserted, it will be observed, has a close kinship to certain of the arguments which have been advanced by the respondents in the cases here pending respecting the power of an extradition judge to issue or to approve the issuance of compulsory process to secure evidence for use in an extradition hearing.

It should be noted that, in the habeas corpus proceeding as argued in the District Court, the extradition defendant gave great emphasis to this argument.

III

THE QUESTION OF MOOTNESS

The respondents' memoranda state, quite properly, that habeas corpus in extradition cannot be treated as an appeal or writ of error. The respondent banks' memorandum proceeds to state that, "Clearly, Judge Whitehurst had before him competent legal evidence on which to base his judgment and finding of probable cause," and suggests that, "It is difficult to conceive of" the possibility that there will be a remand to the extra-

dition judge to receive additional evidence. Respondent Banks' Memorandum Respecting Mootness at 4, 5. The respondent Silvio Gutierrez's memorandum merely suggests that any questions involved in the cases here pending "cannot properly be involved in . . . any remand" that could result from the habeas corpus proceeding. Respondent Silvio Gutierrez's Memorandum Respecting Mootness at 3.

The petitioner here agrees, of course, that Judge Whitehurst's finding is sustained by the evidence, and the habeas corpus court also has agreed with that view. The extradition defendant, however, continues to argue to the contrary, the issue will be presented on his appeal to the United States Court of Appeals, and even though the likelihood of his success on this issue appears remote it cannot be certain that he will fail.

Furthermore—and most importantly—the argument made by the extradition defendant in habeas corpus to the effect that the extradition case should be remanded to Judge Mathes on the ground that he never lost jurisdiction (or related grounds) is quite independent of the question of the sufficiency of the evidence to sustain the finding of Judge Whitehurst. In effect, this argument, were it to prevail, would return the extradition case to the exact status it was in when this Court granted certiorari in the cases here pending, *i.e.*, to a status where only the demanding government's evidence had been received, the extradition defendant's case remained to be heard, and the extradition hearing was still in course, with the demanding government able to move to reopen its case for the receipt of evidence from the respondent banks' records or to tender such evidence in rebuttal. While the habeas corpus court has rejected the extradition defendant's view, it is one which certainly will be urged vigorously on the

pending appeal and, while the petitioner here is confident that the appeal will fail, that cannot be certain. Were the extradition defendant's view to prevail, the cases here pending would at once become most lively.

In sum, it simply is not true that at this time the controversy involved in the cases here pending is dead, however quiescent it may be at this particular moment.

Indeed, the very fact that the extradition defendant is now invoking an argument on the question of the jurisdiction of the extradition judge which is so similar to one of the principal arguments made by the respondents in support of their contention that the extradition judge had no power to issue or approve the issuance of compulsory process gives added emphasis to the point made by the petitioner here that a sovereign nation, coming to these shores to seek extradition of an accused fugitive, should not be forced "to relitigate the entire controversy from the beginning" should the habeas corpus proceeding result in renewal of the self-same extradition proceeding. Petitioner's Memorandum Respecting Mootness at 6. It would be ironical, indeed, were the extradition defendant to prevail in his jurisdictional argument, and so to revive the extradition proceeding, after this Court had dismissed as moot these cases in the very same extradition proceeding in which a blood brother of the same argument is critically involved. The sovereign nation, faced with such a paradox, might be pardoned were it to be baffled.

IV

CONCLUSION

The respondent banks agree with the petitioner that, if the cases here are not moot, they should be retained on this Court's docket, with briefing and argument postponed pending the outcome of the habeas corpus

proceeding. Respondent Banks' Memorandum Respecting Mootness at 6. This does seem the wise course. However important in extradition procedural law are the questions here involved, it must be recognized that the possibility of their mootness by a failure of the extradition defendant's appeal in the habeas corpus proceeding is substantial; this Court's time and attention should not be diverted to these cases until necessary. There is nothing in the nature of the controversy or of the records on which it is presented that stales with age.

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v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

MOTION FOR DISPOSITION OF CASES AS MOOT

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Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 1 and 2

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These consolidated cases appear to be moot, and by this motion petitioner respectfully requests that this Court make appropriate disposition of them in light of their mootness. The suggested disposition is, in accordance with this Court's customary practice, to

vacate the judgments below and remand each case to the Court of Appeals from which it came with instructions to each court to order the particular proceeding under review dismissed as moot. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). The facts petitioner believes make the cases moot are as follows:

The cases arose from an international extradition proceeding under 18 U.S.C. § 3184. They involved attempts by the demanding government in that proceeding, represented by the petitioner as plaintiff, to compel the production of certain bank records as evidence in its behalf. In No. 1 the Court of Appeals for the Fifth Circuit ordered quashed the subpoenas issued in the Southern District of Florida directed to certain banks in New York City, which required the production of specified records of those banks in court in Miami. In No. 2 the Court of Appeals for the Second Circuit ordered quashed subpoenas issued out of the District Court for the Southern District of New York upon notices of deposition, directed to the same banks and requiring production of substantially the same records as upon deposition.

This Court granted certiorari to review the judgments of both courts of appeals on March 20, 1961. 365 U.S. 840. Meanwhile, petitioner, foreseeing lengthy litigation over the bank records and not wishing to delay the extradition proceeding on that account, proceeded with the demanding government's case in extradition without the benefit of the records. On June 23, 1961, the extradition magistrate found probable cause to believe the defendant in the extradition proceeding, Marcos Perez Jimenez, guilty of the crimes with which he was charged to which the bank records

would have been relevant. The magistrate made the appropriate certifications to the Secretary of State and committed the defendant, all pursuant to 18 U.S.C. § 3184. The defendant sought to challenge the magistrate's determination by petition for habeas corpus. This petition was dismissed by the District Court for the Southern District of Florida on August 23, 1961.

The records in these cases having been printed and the time for briefing drawing near, petitioner asked this Court to continue the cases on its calendar but to defer consideration of them in view of the distinct possibility that they would become moot when the habeas corpus case was concluded in the appellate courts. In response this Court on October 9, 1961, ordered argument of the cases postponed. 368 U.S. 804.

In due course an appeal from the dismissal of the habeas corpus petition was heard by the Court of Appeals for the Fifth Circuit and on that appeal the judgment of dismissal was affirmed on December 12, 1962. This Court denied a petition for certiorari on May 13, 1963, 373 U.S. 914, and on June 17 denied a petition for rehearing, 374 U.S. 858.

Thereafter, the judicial proceedings having run their course, the Secretary of State on August 12, 1963, issued his warrant of surrender, directing that the defendant Perez Jimenez be delivered up to the authorities of the demanding government to be taken to Venezuela for trial. On August 16 this warrant was executed by the delivery of the defendant, and he was conveyed out of the United States to Venezuela, where a criminal proceeding against him is now going forward.

In these circumstances it seems clear that the cases are moot, since there is no possibility of the extradition proceedings being reopened for the receipt of additional evidence.

Petitioner has hitherto paid all relevant costs, including the cost of printing the record in the two cases, and is informed by the Clerk's Office that there are no further costs. This Court's order vacating the judgments below because of mootness should not, of course, include any assessment of costs.

WHEREFORE, petitioner prays that this Court enter an order (1) in No. 1 vacating the judgment of the Court of Appeals for the Fifth Circuit and remanding the case to that court with instructions to order the proceeding in the District Court with respect to subpoenas in connection with the extradition proceeding dismissed as moot and (2) in No. 2 vacating the judgment of the Court of Appeals for the Second Circuit and remanding the case to that court with instructions to order the proceeding dismissed as moot.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

MEMORANDUM OF RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA WITH RESPECT TO PETITIONER'S MOTION FOR DISPOSITION OF CASES AS MOOT

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Petitioner states that the two pending consolidated cases which arose in the international extradition proceeding involving Marcos Perez Jimenez are moot and require appropriate disposition by this Court. With that we agree.

We do not agree, however, that the appropriate disposition is for this Court to direct that the judgments of the Courts of Appeals for the Second Circuit and the Fifth Circuit be "vacated" and that the cases be remanded to those Courts with instructions to order all proceedings in the district courts dismissed as moot. All that is required, we submit, is that the pending appeals be dismissed for mootness.

With respect to the disposition of the pending cases, petitioner relies upon the statement of this Court in *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950), where the Court said:

> "... The established practice of the Court in dealing with a *civil case* from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." (Emphasis added)

But that statement was made with respect to a civil case involving a clear *res judicata* probability and wholly unlike the present separate litigations brought in aid of the extradition proceeding.

In the *Munsingwear* case, the United States sued Munsingwear for alleged violation of a price-fixing regulation, seeking, in separate counts: (i) an injunction and (ii) treble damages. By agreement, the treble damage count was held in abeyance pending trial and final determination of the suit for an injunction. Holding that Munsingwear's prices complied with the regulations, the district court dismissed the complaint seeking injunctive relief.

While an appeal from that dismissal was pending the commodity involved was decontrolled, and the Court of

Appeals dismissed the appeal for mootness. The United States acquiesced in the dismissal and made no motion to vacate the judgment. The district court then dismissed the action on the second count for treble damages on the ground that the issues were *res judicata*.

The Supreme Court sustained this dismissal holding: (i) that the parties being the same in both suits, the district court having jurisdiction over both parties and the subject matter, and its judgment in the injunction suit remaining unmodified, the case fell squarely within the rule of *res judicata;* (ii) that the dismissal of the appeal on the ground of mootness in the Court of Appeals did not warrant an exception to the established rule of *res judicata;* and (iii) that the United States having slept upon its rights by failing to move in the Court of Appeals to vacate the judgment below and remand with a direction to dismiss, the dismissal was proper.

But the facts here presented are totally different. They present no question of a possible application of the principle of *res judicata* or of prejudice in any form to the petitioner. Why petitioner which succeeded fully in its extradition objective now seeks to vacate the judgments of the Courts of Appeals, which related to ancillary matters, it is difficult to understand. On August 16, 1963 the warrant of the Secretary of State was executed by delivery of the person of Marcos Perez Jimenez to the authorities of Venezuela, to which he was then taken for trial. That concluded every aspect of the extradition proceedings pending in the courts of this country. As petitioner states (p. 4): "there is no possibility of the extradition proceeding's being reopened for the receipt of additional evidence."

The practice with respect to mootness as stated by the Supreme Court in the *Munsingwear* case was designed to "clear the path for future relitigation of the issues between the parties . . ." (p. 40). Of such relitigation there is here no possibility as petitioner concedes. Nor is there any need to prevent the judgments below from "spawning any legal consequences" (p. 41). Thus all reason for vacating those judgments fails.

Where an appeal is dismissed for mootness, the judgment and the proceedings below should be vacated only if the petitioning party shows possible prejudice, such as clearly would have been present in the treble damage action left pending on the second count in the *Munsingwear* case. But if petitioner can show no possible or probable proceeding which would be unjustly affected by an unreversed or unvacated judgment there is no reason why the judgment should be vacated and it should be allowed to stand. This petitioner has made no such showing and on the undisputed facts cannot possibly suffer any prejudice.

The method of disposition on grounds of mootness is not a mere matter of procedural mechanics. It involves and should involve an exercise of sound discretion based upon the particular facts. As this Court said in *Walling* v. *Reuter Co.*, 321 U. S. 671, 677 (1943):

> "... If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as *justice may require.*" (Emphasis added)

Conclusion

Neither justice nor any discernible reason requires that the judgments below be vacated and that all proceedings in the courts below be dismissed as moot. With respect to these cases we submit that the appropriate disposition is merely to dismiss the pending appeals for mootness.

Dated: New York, N. Y.
September 25, 1963

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

The respondent banks agree that these cases are moot, but they urge that this Court depart from its "established practice" by simply dismissing the writs

rather than vacating the judgments below and ordering the proceedings dismissed as moot. They advance no valid reason for this departure.

The banks, emphasizing that in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), the Court said its "established practice" of vacating a judgment and ordering the proceeding dismissed as moot obtains in a civil case from a court in the federal system, suggest (although they do not positively assert) that the proceedings below were not civil cases. Of course, they were civil cases separate from though ancillary to the extradition proceeding, as the banks themselves argued in the Fifth Circuit case in persuading the Court of Appeals that there was a final and appealable judgment. In any event, the rule of the *Munsingwear* case has been applied in statutory proceedings in the courts of appeals for review of administrative agency orders, which are not "suits of a civil nature" within the scope of the Federal Rules of Civil Procedure. See, *e.g.*, *SEC* v. *Philadelphia Co.*, 337 U.S. 901 (1949) (cited in footnote 2 of the *Munsingwear* opinion); *Eastern Air Lines, Inc.* v. *CAB*, 341 U.S. 901 (1951).

The main ground of the banks' opposition to petitioner's proposed disposition of the cases, however, is that petitioner has not shown that he will be prejudiced if the judgments below are allowed to stand. A showing of prejudice has never been thought necessary to move this Court to make what "has become the standard disposition in federal civil cases," 340 U.S. at 39 n.2. Indeed, it is quite clear from some of the cases cited by the Court in the *Munsingwear* opinion as illustrating the "established practice" in which there was a full exposition of the facts that the judgment was vacated and the proceeding ordered dismissed even though there was no possibility of another suit in which the judgment might have res judicata effect or other legal consequences. See *Berry* v. *Davis*, 242 U.S. 468 (1917); *Board of Pub. Util. Comm'rs* v. *Compania General de Tabacos*, 249 U.S. 425 (1919); *Atherton Mills* v. *Johnston*, 259 U.S. 13 (1922).

The respondent banks have been informed by counsel for the petitioner of the possibility that there may be further efforts by Venezuela to secure the bank records in question for use in the criminal proceeding now pending in Venezuela or otherwise. Unless the banks think they will be aided in their defense against any such efforts by leaving the judgments below in force, it is difficult to perceive any practical reason for their opposition to petitioner's proposed disposition. If they think the judgments would assist them, that is a cogent reason for wiping them off the books when review of them on their merits by this Court has been aborted.

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September 1963